UNDERGRADUATE ACADEMIC RECORD OF: LUKE F COLLE
STUDENT RECORD ADDRESS: 97 3RD AVE
MASSAPEQUA PARK, NY 11762-2520

STUDENT ID: 1679500
PRINT DATE: 12/16/18
BIRTH DATE: 10/07

UNDERGRADUATE ACADEMIC RECORD

---------- DEGREES ----------

BACHELOR OF ARTS AWARDED: 05/31/18
HONORS: SUMMA CUM LAUDE
HONORS COLLEGE
DEPARTMENTAL HONORS
PI SIGMA ALPHA (POLITICAL SCIENCE HNRY)
W. GRAFTON NEALLEY EXCEL AWARD (POL SCI)

ADELPHI UNIVERSITY ETS CODE: 002003
MAJOR : POLITICAL SCIENCE

---------- ADMINISTRATIVE TERM ----------

CREDIT AWARDED: ST. JOHN'S UNIVERSIT ETS.CODE: 002799

American Civilization To	02/13 - 05/13	3.0	
Precalculus for Business and Life Sciences	02/13 - 05/13	3.0	

TOTAL CREDITS ACCEPTED: 6.0

---------- FALL '14 ----------

SCHOOL: College of Arts and Sciences
MAJORS: POLITICAL SCIENCE IRP: 04179

ENG	107	Art & Craft of Writing	B-	3.0	8.1
HON	101	MODERN CONDITION I	B+	4.0	13.2
POL	101	Introduction To The American Political System	A	3.0	12.0
HIS	101	Western Civilization I	A-	3.0	11.1

	AHRS	EHRS	QHRS	QPTS	GPA
CURRENT:	13.0	13.0	13.0	44.4	3.415

---------- SPRING '15 ----------

HONORS: DEANS' LIST

ANT	225	Human Evolution	A+	4.0	16.0
HON	102	Modern Condition II	A	4.0	16.0
POL	102	Introduction To Politics	A	3.0	12.0
POL	260	Comparative Political Analysis	A	3.0	12.0
ECA	111	The Price System	B+	3.0	9.9

	AHRS	EHRS	QHRS	QPTS	GPA
CURRENT:	17.0	17.0	17.0	65.9	3.876

---------- FALL '15 ----------

HONORS: DEANS' LIST

POL	342	American Political Thought	A	3.0	12.0
POL	240	Ancient & Medieval Political Theory in the Western Wor	A	3.0	12.0
MUH	238	History of Jazz: Before 1950	A+	3.0	12.0
JPN	111	Level I Japanese	A	3.0	12.0
POL	246	Research Design And Methods	A+	3.0	12.0

	AHRS	EHRS	QHRS	QPTS	GPA
CURRENT:	15.0	15.0	15.0	60.0	4.000

---------- SPRING '16 ----------

HONORS: DEANS' LIST

HON	320	Social Science Seminar: Politics and Literature I	A	3.0	12.0
JPN	112	Japanese Level II	A	3.0	12.0
HIS	102	Western Civilization I I	A-	3.0	11.1
POL	365	Politics of the Middle East	A	3.0	12.0
HIS	490	Independent Study Classical Antiquity II	A	3.0	12.0

	AHRS	EHRS	QHRS	QPTS	GPA
CURRENT:	15.0	15.0	15.0	59.1	3.940

---------- END OF PAGE ----------

ADELPHI UNIVERSITY

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ATTN: LUKE COLLE
97 3RD AVE
MASSAPEQUA PARK, NY 11762-252

#422011

Steven E. Smith, University Registrar

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STUDENT ID: 1679500
PRINT DATE: 12/16/18
BIRTH DATE: 10/07

---------- FALL '16 ----------

HONORS: DEANS' LIST

POL	323	Individual Rights in the Constitution	A	3.0	12.0
POL	241	Modern Political Theory in the Western World	A+	3.0	12.0
JPN	121	Level III Japanese	A	3.0	12.0
POL	459	Seminar Political Theory	A	3.0	12.0
HON	210	Honors - Human Condition I	A-	3.0	11.1

	AHRS	EHRS	QHRS	QPTS	GPA
CURRENT:	15.0	15.0	15.0	59.1	3.940

---------- SPRING '17 ----------

HONORS: DEANS' LIST

POL	345	Feminist Theory	A	3.0	12.0
POL	321	The American Congress	A	3.0	12.0
HIS	207	History of East Asia II	A	3.0	12.0
JPN	122	Level IV Japanese	A	3.0	12.0
HIS	490	Independent Study Classical Antiquity III	A	3.0	12.0

	AHRS	EHRS	QHRS	QPTS	GPA
CURRENT:	15.0	15.0	15.0	60.0	4.000

---------- FALL '17 ----------

HONORS: DEANS' LIST

JPN	390	Special Topics	A	3.0	12.0
POL	280	Theories And Practice of International Relations	A	3.0	12.0
HON	490	Honors-Thesis in Liberal Studies	A	3.0	12.0
HIS	206	History of East Asia I	A	3.0	12.0

	AHRS	EHRS	QHRS	QPTS	GPA
CURRENT:	12.0	12.0	12.0	48.0	4.000

---------- SPRING '18 ----------

MINORS: ASIAN STUDIES
HONORS: DEANS' LIST

PES	130	Beginning Karate	P	2.0	
CSC	170	Introduction To Computers and Their Applications	A	3.0	12.0
HON	485	Liberal Arts Lab Seminar: Theogeny,Myth,and Ritual in Classical Antiquity	A	4.0	16.0
HON	211	Honors-The Human Condition II	A	3.0	12.0
HON	490	Honors-Thesis in Liberal Studies	A	0	

	AHRS	EHRS	QHRS	QPTS	GPA
CURRENT:	12.0	12.0	10.0	40.0	4.000
CUMULATIVE:	114.0	120.0	112.0	436.5	3.897

---------- END OF TRANSCRIPT ----------

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JPN	111	Level I Japanese	A	3.0	12.0
POL	246	Research Design And Methods	A+	3.0	12.0

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JPN	112	Japanese Level II	A	3.0	12.0
HIS	102	Western Civilization I I	A-	3.0	11.1
POL	365	Politics of the Middle East	A	3.0	12.0
HIS	490	Independent Study Classical Antiquity II	A	3.0	12.0

	AHRS	EHRS	QHRS	QPTS	GPA
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HIS	207	History of East Asia II	A	3.0	12.0
JPN	122	Level IV Japanese	A	3.0	12.0
HIS	490	Independent Study Classical Antiquity III	A	3.0	12.0

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HON	485	Liberal Arts Lab Seminar: Theogeny,Myth,and Ritual in Classical Antiquity	A	4.0	16.0
HON	211	Honors-The Human Condition II	A	3.0	12.0
HON	490	Honors-Thesis in Liberal Studies	A	0	

	AHRS	EHRS	QHRS	QPTS	GPA
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ATTN: LUKE COLLE
97 3RD AVE
MASSAPEQUA PARK, NY 11762-252

#422011

Steven E. Smith, University Registrar

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Cornell Law School

WILLIAM A. JACOBSON
Clinical Professor and Director of the Securities Law Clinic

138 Hughes Hall
Ithaca, New York 14853-4901
Phone 607.255.6293 / 607.255.7193 (fax)
E-mail: @cornell.edu

March 29, 2022

The Honorable Lewis J. Liman
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am pleased to offer my strong recommendation of Luke F. Colle for a judicial clerkship.

I am a Clinical Professor of Law and Director of the Cornell Securities Law Clinic (the "SLC"), which I founded in 2008, at Cornell Law School. The SLC represents public investors in disputes with securities broker-dealers through arbitration at the Financial Industry Regulatory Authority ("FINRA"), provides presentations to the public on how to avoid becoming a victim of investor fraud, prepares and submits regulatory comment letters, and engages in investment-related research. During the pandemic we have increased the use of mock mediations and arbitrations as part of coursework. Students may enroll in up to three semesters of the SLC, subject to my approval.

Luke took three semesters of SLC and was an outstanding student. Luke received a solid "A" in each of the first two semesters, and an "A+" for the third semester, which is highly unusual and reflected Luke's dedication, quality of work, and self-starting qualities.

In SLC1, Luke took on a leadership role in the mock mediation and arbitration. Luke also took on an extra project in a public presentation on how to avoid becoming a victim of investment fraud. In SLC2, Luke wrote a paper on pre-dispute forum selection agreements in the securities arbitration context. The paper was so exceptional that it was published in the law journal of the Public Investor Advocates Bar Association, an association of attorneys dedicated to protecting individual investors. In SLC3, Luke researched and wrote a paper on blockchain technologies and securities transactional settlements.

Looking back over Luke's three semesters in the Securities Law Clinic, I can say unequivocally that Luke would make a great judicial law clerk.

Sincerely,

William A. Jacobson
Clinical Professor and Director of the Securities law Clinic

Cornell Law School

WILLIAM A. JACOBSON
Clinical Professor and Director of the Securities Law Clinic

138 Hughes Hall
Ithaca, New York 14853-4901
Phone 607.255.6293 / 607.255.7193 (fax)
E-mail: @cornell.edu

Cornell Law School

BIRGITTA SIEGEL, ESQ.
Adjunct Professor of Law
Cornell Securities Law Clinic
138 Hughes Hall
Ithaca, NY 14853
Tel: 315-956-0245
Email: bks57@cornell.edu

March 29, 2022

The Honorable Lewis J. Liman
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Luke Colle, Cornell Law School J.D. Class of 2021

Dear Judge Liman:

It is my sincere honor to enthusiastically recommend Luke Colle for a judicial clerkship in your Honor's chambers.

Luke was my student in Cornell's Securities Law Clinic ("SLC") for the fall and spring semesters of the 2020-21 academic year. The SLC is a rigorous 4 credit curricular offering for select upper level law students, who must compete for acceptance into the SLC. Once in the clinic, students undertake a heavy workload of doctrinal study, analyses, writing projects and various avenues of advocacy on behalf of securities investors. Luke stood out as a 'star' within a group of students who already were established as exceptionally talented people. He earned an A in his first semester with me, and as such was one of a select few to have earned that grade in recent years of my class. And in his final semester of clinic, indeed his final semester of law school, Luke earned the highest possible grade: A+. He is the only student of mine to have received that grade in years.

One of Luke's final projects in the SLC was researching and writing on cutting edge issues concerning contractual forum selection clauses in the face of mandatory arbitration rules adopted by securities regulators. The final 33 paged paper, entitled

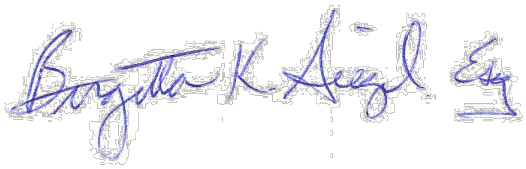
An Investor's FINRA Rule 12200 Arbitration Right Should Supersede Contrary Forum-Selection Agreements, has been published by the PIABA Bar Journal and is available on Westlaw. Luke's article provides a clear discussion of the split among some Circuit Courts of Appeals on the issue and explores the regulatory framework and laws, while providing his well-reasoned conclusion. Indeed, Luke's article already serves as a stellar resource to attorneys practicing in the securities industry.

Luke excelled in several key professional ways that would bring particular benefit to a judicial office. His work was outstanding at every turn, whether it be the sophistication of analyses or the clarity and expressiveness of his writing. Luke has a very strong work ethic and high energy. His assignments were usually completed comfortably in advance of deadlines. He exceeded my expectations most favorably.

One personal comment I must make about Luke – he is empathetic and kind. His intellectual skills are complemented by his personal qualities. I have never seen him other than cheerful and enthusiastic. Luke is a true pleasure to work with. During the pandemic, Luke even volunteered to help classmates who were struggling as they researched difficult topics for their own SLC papers. Two students accepted Luke's offer and found his help to be valuable. He brought upbeat encouragement and focus to these students, and I have never seen another student so graciously show genuine concern and compassion. I believe your Honor would be well served and delighted to have Luke as your law clerk.

Please feel free to contact me at either bks57@cornell.edu, or 315-956-0245 if you would like to discuss this recommendation further.

Sincerely,



Birgitta Siegel, Esq

Cornell Law School

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF REGIONAL OFFICES
SYRACUSE REGIONAL OFFICE

October 29, 2021

Online System for Clerkship Application and Review
ATTN: Administrative Office of the United States Courts for Law Clerk Recruitment
VIA ELECTRONIC SUBMISSION

RE: Letter of Recommendation for Federal Clerkship
Luke Colle

Dear Sir/Madam,

I am an Assistant Attorney General with the New York State Attorney General's Office, and my practice is solely litigation based. Luke Colle has recently requested that I write a letter of recommendation on his behalf regarding Federal Clerkship opportunities. I am honored to write such a letter on behalf of Luke.

In the Spring of 2021, Luke enrolled in the New York State Attorney General Practicum Clinic through Cornell University's Law School. I am honored to teach such Practicum Clinic, and it is here where I had the privilege of meeting Luke. In short, Luke was my student.

Under normal circumstances, the AG Practicum is a clinical program where (1) we hold in person classes once a week, (2) students come into the Office once a week, and (3) students continually work on assignments throughout the semester to assist our Assistant Attorneys General in "real life" cases that they are handling. However, our world was turned upside down in the Spring of 2021 due to the global pandemic. In person classes became virtual Zoom classes, visitors or students were not allowed to come into our Offices, and Assistant Attorneys General scrambled to try and keep their caseloads moving.

As one can imagine, these circumstances did not make it easy for students like Luke, who was trying to gain "real life" practical experience in legal world that had been turned upside down. Nonetheless, Luke genuinely stands out in my mind as a student who excelled at adapting to such environment and thriving as a member of our Clinic.

Specifically and over the course of about five months, I interacted with Luke on nearly a daily basis as he worked on a number of different cases that I handled, primarily performing file review, detailed factual study, legal research, and legal analysis.

300 SOUTH STATE STREET, SUITE 300, SYRACUSE, NY 13202 ● PHONE (315) 448-4800 ● FAX (315) 448-4853 * NOT FOR SERVICE OF PAPERS
WWW.AG.NY.GOV

I was very impressed with Luke's ability to effectively handle assignments concerning a wide variety of cases that we defend, including, but not limited to, medical malpractice, negligent highway design, prison assaults, and eminent domain proceedings. Luke's work product was always based on comprehensive and accurate legal research; in short, Luke is an outstanding legal researcher. Moreover, Luke's written product was well organized, understandable, and concise. I believe that Luke's written product was the result of a unique characteristic that Luke possesses. More than any student than I have worked with, Luke continually asked questions to gain as much clarity as possible regarding his work assignment. This unique characteristic cannot be emphasized enough: Luke thrives for clarity and, in turn, his work product greatly benefits.

Furthermore, it is critical to note that during the clinical program, Luke was not a bystander but, rather, he was an active participant and a contributor. Luke was always eager to learn and, perhaps more importantly, eager to be challenged. I believe that through my observations, Luke's desire to put in the hours, learn, and be challenged was driven by his excitement about the law and his hunger to be successful in this challenging profession.

Additionally, it is important to speak about Luke as a person. It was a genuine pleasure to work with and get to know Luke. He was professional, optimistic, a team player, and interacted with an outlook that was good to be around. He is the type of person that you want as a colleague.

Accordingly, I highly recommend Luke for a Federal Clerkship. I am confident that Luke will be a tremendous asset as a Federal Clerk.

Please feel free to contact me with any questions or concerns regarding this letter of recommendation for Luke. I may be reached directly via telephone at (315) 448-4816, or via e-mail at kevin.grossman@ag.ny.gov.

Sincerely,

Kevin A. Grossman /s/

Kevin A. Grossman, Esq.
Assistant Attorney General

KAG

300 South State Street, Suite 300, Syracuse, NY 13202 ● Phone (315) 448-4800 ● Fax (315) 448-4853 * Not For Service of Papers
www.ag.ny.gov

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

GEORGE HAROLD,	)	
Plaintiff,	)	
v.	)	No. CIV-18-518 (LGF)
SOAR, INC.,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Luke Colle
MYRON TAYLOR LLP
121 Veterans Pl.
Ithaca, New York
(123) 867-5309
Attorney for Defendant

CONTENTS

Soar, Inc. (Soar) submits this Memorandum of Law in Opposition to George Harold's Motion for Summary Judgment.

INTRODUCTION

In the wake of a national scandal where male coaches victimized hundreds of female gymnasts, Dana Pilkey founded Soar as a safe space for girls to learn gymnastics. Because coaches must touch gymnasts' chests, bare legs, and bare upper thighs for instruction, Soar follows a sex-based hiring policy for girls' gymnastics coaches. Consistent with this policy, when George Harold applied to coach girls' gymnastics, Soar declined to hire him. Harold is not entitled to summary judgment on his sex-discrimination claim under Title VII of the Civil Rights Act of 1964 because a reasonable jury could conclude that sex is a bona fide occupational qualification (BFOQ) to coach Soar's girls' gymnastics program.

First, Soar has a petition representing 90% of its girls' program families—half who transferred their daughters from gyms with male coaches—who will stop patronizing Soar if it hires a male coach. Second, coaches must touch girls' chests, bare legs, and bare upper thighs; Soar only enforces a sex-based hiring policy when that touching must occur; and gymnasts cannot choose their coaches' sex. Finally, every alternative to a sex-based hiring policy would allow the intimate touching and impose a high cost on Soar.

STATEMENT OF FACTS

Male coaches have abused dozens of female gymnasts during instruction. (Soar Aff. Ex. A.) Indeed, a nine-month investigation found that USA Gymnastics, the sport's national governing body, failed to implement an effective coach-oversight system, so that predators went undetected (*Id.*) Moreover, USA Gymnastics failed to report at least fifty complaints of sexual abuse against coaches. (*Id.*)

Wanting to help, Dana Pilkey founded Soar, Inc. as a safe space for girls to build self-confidence and learn gymnastics. (Pilkey Dep. 3:7–3:9.) Soar serves about 415 children, 300 of whom participate in the girls' program. (*Id.* at 5:22.) Women coach the program, so girls do not stress about their bodily privacy—after all, coaches must touch girls' chests, bare legs, and bare upper thighs for instruction. (*Id.* 3:15–4:1.)

Soar has two co-educational programs: one for pre-school and another for school-age children. (Answer ¶ 16.) The programs do not teach traditional gymnastics, so neither requires intimate touching; thus, males and females coach the co-educational programs. (Pilkey Dep. 4:4–4:18.)

Around July 2018, consistent with its hiring policy, Soar declined Harold's application to coach its girls' gymnastics program. (Answer ¶ 13.) According to a petition, if Soar hires male gymnastics coaches, 253 households representing at least 90% of the girls' program will stop patronizing Soar. (Pilkey Aff. Ex. B.) Indeed, 150 girls' program gymnasts transferred to Soar from gyms with male coaches. (Pilkey Dep. 5:24.)

On September 4, 2018, Harold filed a discrimination charge against Soar with the Equal Employment Opportunity Commission (EEOC). (Answer ¶ 17.) The EEOC argued that Soar could have hired Harold and protected girls' privacy if Soar (1) required background checks for all staff who work with children; (2) enforced the USAG Safe-Sport Policy; (3) prohibited coaches from being alone with gymnasts; (4) required all coaches, parents, and gymnasts to undergo annual, in-person sexual-abuse response training; or (5) encouraged parents to watch gymnastics classes. (Harold Aff. ¶ 3.)

Soar raised the affirmative defense that sex is a BFOQ for its girls' gymnastics coaches and now opposes Harold's summary-judgment motion. (Answer ¶ 2.)

ARGUMENT

This Court should deny Harold's summary-judgment motion. Summary judgment is only proper if the movant can show that there is no material fact at issue "and the [movant] is entitled to judgment as a matter of law." *EEOC v. Sedita*, 816 F. Supp. 1291, 1294 (N.D. Ill. 1993). In deciding summary judgment, courts view all evidence and draw all reasonable inferences in the nonmovant's favor. Here, a reasonable jury could find in Soar's favor.

I. This Court Should Deny Harold's Motion for Summary Judgment Because A Reasonable Jury Could Conclude that Sex is a Bona Fide Occupational Qualification to Coach Girls' Gymnastics at Soar.

Under Title VII of the Civil Rights Act of 1964, an employer can use sex as a job qualification if sex is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business." 42 U.S.C. § 2000e-2(e)(1) (2018). An employer can establish a privacy-based BFOQ defense if (1) it has a factual basis for believing that "hiring any member of one sex would undermine the essence of [its] business," (2) the asserted privacy interest is entitled to legal protection, and (3) the employer has no reasonable alternative method to protect the privacy interest. *Sedita*, 816 F. Supp. at 1295. First, Soar has a factual basis for believing that hiring male coaches will undermine the essence of its business because coaches must intimately touch gymnasts and Soar has a petition certifying that if it hires a male coach, it will lose most patrons of its girls' program. Second, Soar's asserted privacy interest is sufficient to survive summary judgment because coaches must touch girls' chests, bare legs, and bare upper thighs; Soar only enforces a sex-based hiring policy where coaches implicate that interest; and gymnasts cannot choose their coaches' sex. Third, Soar has no reasonable alternative to protect the privacy interest because every alternative would let men intimately touch girls and be costly to Soar, and one alternative would also disrupt Soar's gymnastics classes.

A. Soar has a factual basis for believing that hiring male coaches will undermine the essence of its business because coaches must touch gymnasts for instruction, and Soar has a petition signed by patrons, many of whom transferred from gyms with male coaches, who will stop patronizing Soar if it hires a male coach.

There is a factual basis for believing that hiring one sex will undermine the essence of a business if patrons would reject service by one sex and service by that sex would cause patrons to "stop patronizing the business." *Norwood v. Dale Maint. Sys.*, 590 F. Supp. 1410, 1416 (N.D. Ill. 1984). There is a factual basis for believing that hiring one sex will undermine the essence of a business when core job tasks intrude on patrons' privacy. *Id.* at 1417.

In *Sedita*, an all-female gym had a factual basis for believing that hiring male managers would undermine the essence of its business when over 10,000 customers signed a petition, corroborated by 13 affadavits from club managers, insisting that, if the employer hired a male coach, they would reject the male's service and would cancel their memberships. *Sedita*, 816 F. Supp. at 1297. Moreover, the essence of the job involved intimately touching female clients to measure them. *Id.* at 1296. Likewise, in *Norwood*, a landlord had a factual basis because its expert witnesses testified that janitors cleaning opposite-sex restrooms would necessarily invade tenants' privacy; but, the landlord did not show that tenants would move out. *Norwood*, 590 F. Supp. at 1417.

Here, Soar, like the women's gym in *Sedita*, has a petition with many signees who certify that, if the employer hires a male, they will reject the male's service and will stop patronizing the business. Whereas in *Sedita* managers verified the petition to give it force, Pilkey testified that half of the signees transferred their daughters to Soar from gyms with male coaches; it follows that those signees will transfer their daughters elsewhere if Soar hires a male coach. Moreover, just like *Sedita*'s managers, Soar's coaches must intimately touch patrons. Furthermore, Soar has a greater factual basis than the *Norwood* landlord: although opposite-sex bathroom cleaning and

opposite-sex gymnastics coaching both implicate privacy, Soar has evidence that it will lose business.

Therefore, a reasonable jury could conclude that Soar has a factual basis for believing that hiring male coaches would undermine the essence of its business.

B. A reasonable jury could conclude that Soar's asserted privacy interest is legally protectable because coaching involves touching girls' chests, bare legs, and bare upper thighs; Soar only prohibits males from coaching the program where coaches must intimately touch girls; and Soar does not allow patrons to choose their coaches' sex.

Intimate touching implicates a protectable privacy interest. *Sedita*, 816 F. Supp. at 1296. The employer must not invoke privacy as an excuse to cater to customer preference. *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052, 1052. The employer must protect the privacy interest in a consistent way. *Henry v. Milwaukee Cty.*, 539 F.3d 573, 582–83 (7th Cir. 2008). The court can best determine privacy issues after a trial. *Olsen*, 75 F. Supp. at 1070.

In *Sedita*, a gym's asserted privacy interest survived summary judgment on the legally protectable question when gym managers touched female patrons' breasts, buttocks, and inner thighs for measurement. *Sedita*, 816 F. Supp. at 1297. Similarly, in *Olsen*, a massage parlor's asserted privacy interest survived summary judgment on the legally protectable question because privacy is an inherently personal matter, even though patrons controlled where therapists touched them and the employer catered to patrons' preferences by allowing patrons to choose their therapists' sex. *Olsen*, 75 F. Supp. at 1070. In *Henry*, however, a prison protected juvenile offenders' privacy in an inconsistent way by allowing opposite-sex supervision when juveniles were most exposed, so the court rejected the prison's BFOQ claim. *Henry*, 539 F.3d at 582–84.

Here, like the managers who touched breasts, buttocks, and thighs in *Sedita*, coaches must touch girls' chests, bare legs, and bare upper thighs; therefore, the privacy interest can survive summary judgment. Indeed, unlike the patrons who can exercise choice in *Olsen*, Soar's

gymnasts cannot choose the employee's sex and must subject themselves to uncertain touching; thus, Soar is not catering to consumer preference and there is a greater implicated privacy interest than in *Olsen*. Finally, unlike the prison's position in *Henry*, Soar's position is consistent—Soar only prohibits men from coaching the program where they must intimately touch girls.

Therefore, a reasonable jury could conclude that Soar is asserting a legally protectable privacy interest.

C. Soar has no reasonable alternative to protect girls' privacy interests because each alternative allows for a significant privacy intrusion and carries a high cost.

An alternative is unreasonable if it allows the complained-of privacy intrusion. *Hernandez v. Univ. of St. Thomas*, 793 F. Supp. 214, 218 (D. Minn. 1992). An alternative is also unreasonable if it is prohibitibely costly. *Sedita*, 816 F. Supp. at 1297. An alternative is also unreasonable if is disruptive. *Norwood*, 590 F. Supp. at 1423. The court can best determine reasonableness after a trial. *Sedita*, 816 F. Supp. at 1298.

In *Sedita*, the court held a jury should decide whether proposed alternatives were reasonable where the alternatives let male employees touch female clients intimately and the alternatives would have been costly: they would have caused patrons to leave, and the employer would have had to install men's bathrooms. *Id.* at 1297. On the other hand, in *Henry* there were reasonable alternatives to a sex-based hiring policy because the employer did not indicate alternatives' costs. *Henry*, 539 F.3d at 582. Yet, in *Norwood*, there was no reasonable alternative to the sex-based hiring of bathroom custodians to protect tenants' privacy, in part because having custodians leave the bathroom whenever tenants entered it would have disrupted the cleaning schedule. *Norwood*, 590 F. Supp. at 1423.

Like the alternatives in *Sedita*, Soar's alternatives to a sex-based hiring policy allow the privacy intrusion of intimate touching and would repel clients. Admittedly, unlike the gym in *Sedita*, Soar would not have to install male bathrooms, but Soar would lose 90-percent of its largest program's clients. Therefore, Soar has evidence of alternatives' costs which sets it apart from the employer in *Henry*. Furthermore, encouraging parents to watch gymnastics classes would be more disruptive than the delay in *Norwood*; if parents would stay for gymnastics instruction, they would create a distraction that would not only delay gymnasts' progress during instruction but would risk exposing them to injury.

Therefore, a reasonable jury could conclude that Soar has no reasonable alternative to protect the privacy interest.

CONCLUSION

Consequently, a reasonable jury could conclude that sex is a bona fide occupational qualification to coach girls' gymnastics at Soar, and the Court should deny Harold's Motion for Summary Judgment.

Respectfully submitted,

SOAR, INC.,

By its attorney,

Luke Colle

AN INVESTOR'S FINRA RULE 12200 ARBITRATION RIGHT SHOULD SUPERSEDE CONTRARY FORUM-SELECTION AGREEMENTS

BY LUKE COLLE*

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INTRODUCTION

A. *A Brief History of Predispute Arbitration Agreements*

Predispute arbitration agreements (PDAAs) have a precarious history. In the early United States, courts rarely enforced PDAAs.[1] Parties could revoke them, and judges would only recognize nominal damages for breach of contract.[2] However, in the 1920s, as part of a movement for procedural reform,[3] Congress passed the Federal Arbitration Act (FAA) to make PDAAs as enforceable as other contracts.[4] Although, Courts were still hesitant to enforce them: for instance, in 1953, the Supreme Court found a PDAA unenforceable, holding that it waived compliance with a Securities Act provision.[5] The Supreme Court only overruled that decision in the late-1980s in *Rodriguez de Quijas v. Shearson/American Exp., Inc*.[6] Since *Rodriguez*, PDAAs have become more frequent, which has led to a rise in surrounding regulation. For example, in 1999, the National Association of Securities Dealers (NASD), a self-regulatory organization (SRO) which regulated broker-dealers, amended its rules to require broker-dealers to (a) highlight all predispute arbitration clauses in contracts with customers and (b) provide each affected customer with a separate confirmation-document.[7] The NASD wanted these disclosure-requirements to guarantee that each customer understood when they had agreed to arbitrate.[8] Today, the NASD's successor, the Financial Industry Regulatory Authority (FINRA), maintains the NASD's concerns about fair disclosure to customers.[9] So, FINRA Rule 2268 maintains the NASD's disclosure-requirements regarding PDAAs.[10]

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* I would like to thank Professor Birgitta Siegel of Cornell Law School for her guidance and support as I wrote this Article.

[1] *See* LAURA J. COOPER ET AL., ADR IN THE WORKPLACE 31 (2000) ("Traditionally, courts have been hostile to arbitration, viewing it as an institution that would deprive the courts of their jurisdiction.").

[2] *See, e.g.*, Munson v. Straits of Dover S.S. Co., 102 F. 926, 928 (2d Cir. 1900) (awarding only nominal damages for a breach of a PDAA, reasoning that judicial process is "theoretically at least, the safest and best devised by the wisdom and experience of mankind").

[3] IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 174 (1992).

[4] 9 U.S.C. §§ 2–4; Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years after Doctor 's Associates, Inc. v. Casarotto*, 54 CLEVELAND STATE L. REV. 249, 252–53 (2006).

[5] Wilko v. Swan, 346 U.S. 427, 438 (U.S. 1953). The Court held that PDAAs violated Securities Act § 14. *Id.* § 14 provides that "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n.

[6] Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477 (1989).

[7] Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to NASD Rule 3110(f) Governing Use of Predispute Arbitration Agreements With Customers, SEC Release No. 34-42160 (Nov. 19, 1999).

[8] *Id.*

[9] *See* FINRA, RULE 2268 (2011).

[10] *Id.*

Regulators have refrained from outlawing PDAAs. FINRA has asserted that "whether PDAAs should be prohibited is a policy question for Congress and the [Securities and Exchange Commission (SEC)][11] to decide."[12] But, Congress has also "kicked the can"—the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) directed the SEC to study PDAAs and gave the SEC express authority to prohibit them.[13]

A special predispute arbitration agreement is FINRA Rule 12200, a FINRA regulation which gives customers the right to arbitrate disputes with broker-dealers.[14]

B. *The Customer's Historical Arbitration Right*

Since the late 19th century, customers have maintained the right to compel broker-dealers to arbitrate.[15] "In 1869, the New York Stock Exchange (NYSE) amended its constitution to expressly provide [] investors the right to demand arbitration of disputes with [exchange-member] firms."[16] The NYSE intended for the amendment to protect customers, as NYSE arbitration was speedy and inexpensive.[17] The NYSE later incarnated the amendment as NYSE Rule 600(a).[18] In 1935, the SEC Chairman (only one year after Congress created the SEC) endorsed the customer's right to arbitrate, saying in a memorandum to the NYSE: "The right to arbitration before the arbitration committee of the exchange is at present granted to any customer regardless of the contract between the member and the customer."[19] In 1972, the NASD also recognized customers' right to invoke arbitration via NASD Rule 10301.[20] More recently, in 2007, the SEC approved a merger of the NYSE and NASD's arbitral forums into FINRA arbitration; thus, NYSE Rule 600(a) and NASD Rule 10301 consolidated into FINRA Rule 12200.[21]

C. *FINRA Rule 12200*

FINRA Rule 12200 requires parties to arbitrate a dispute if (1) either the customer requests it or a written agreement requires it, (2) the dispute is between a customer and either a FINRA-member or a FINRA-member's associate, and (3) "the dispute arises in connection with the member's business activities."[22] Generally, a customer is one, aside from a broker-dealer, who "purchases a [commodity] or [service] from

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[11] The SEC is an independent agency that Congress created to oversee and regulate securities markets. *See* SEC. & EXCH. COMM'N, *About the SEC*, SEC.GOV (Nov. 22, 2016), https://www.sec.gov/about.shtml.
[12] FINRA Dispute Resolution Task Force, *Final Report and Recommendations of the FINRA Dispute Resolution Task Force*, at 46 (2015), https://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf.
[13] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921(a), 124 Stat. 1376, 1841 (2010).
[14] FINRA, RULE 12200 (2008).
[15] *See* Constitution and By-Laws of the New York Stock Exchange, at 35 (1869).
[16] *Id*.
[17] *See* FRANCIS L. EAMES, THE NEW YORK STOCK EXCHANGE 69–70 (1894) (describing NYSE arbitration in the 1880s).
[18] FINRA, *NYSE Arbitration Rules (Rules 600A–639)* (2007), https://www.finra.org/sites/default/files/ArbMed/p117075.pdf.
[19] SEC Release No. 34-131 at 3 (Mar. 21, 1935). Furthermore, the SEC recommended that the NYSE offer customers more arbitral bodies, such as arbitration before non-NYSE tribunals, but the NYSE did not implement the recommendation. *Id*. *See* Jill Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISPUTE RESOLUTION 171, 180 (2016).
[20] NAT'L ASS'N OF SEC. DEALERS, NASD Notice to Members, Proposed Amendments to By-Laws, Rules of Fair Practice and the Code of Arbitration Procedure, at 1 (July 23, 1971). *See* Jill Gross, *The Customer's Nonwaivable Right to Choose Arbitration in the Securities Industry*, 10 BROOK J. CORP. FIN. & COM. L. 383, 397 (2016).
[21] *See* Press Release, Fin. Indus. Regulatory Auth., NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority – FINRA (July 30, 2007).
[22] FINRA, RULE 12200 (2008).

the FINRA-member in the course of the member's business activities."[23] In some Circuits, the person must receive more than mere financial advice.[24] Regardless, courts generally interpret the term "customer" using its everyday meaning.[25] The dispute must involve the "investment banking or securities business" rather than some unrelated business.[26] FINRA members are those who FINRA has admitted to membership.[27]

Although Rule 12200 is not statutory, the SEC's approval gives Rule 12200 the force of law.[28] The Securities Exchange Act § 78o-3 requires the SEC to supervise and regulate SROs like FINRA,[29] and the SEC authorized FINRA to exercise "regulatory oversight over all securities firms that do business with the public."[30] Rule 12200 underwent a number of official channels before the SEC could approve it: FINRA had to solicit comments on the rule from the public, pass SEC review, satisfy secondary rounds of comments, and FINRA eventually published formal notice in the Federal Register.[31] Consequently, FINRA must sanction members who violate Rule 12200, and those sanctions can involve suspension or expulsion from FINRA.[32] This is significant because all U.S. securities dealers must have a SRO-membership to operate.[33] Therefore, if a dispute satisfies Rule 12200's criteria, then the aggrieved customer can haul their broker-dealer into arbitration;[34] if the broker-dealer refuses, FINRA can effectively close the business.[35] As opposed to litigation, a customer may sometimes find arbitration "[less] costly, more expedient, and equally fair" which facilitates their recovery.[36]

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[23] FINRA, RULE 12100(k); Goldman Sachs & Co. v. City of Reno, 747 F.3d 733, 740 (9th Cir. 2014); *see* Morgan Keegan & Co. v. Silverman, 706 F.3d 562, 566 (4th Cir. 2013); *see also* UBS Financial Services, Inc. v. Carilion Clinic, 706 F.3d 319, 325 (4th Cir. 2013).

[24] Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc., 264 F.3d 770, 773 (8th Cir. 2001).
[25] *See also UBS Financial Services, Inc.*, 706 F.3d at 325; *see also City of Reno*, 747 F.3d at 740.
[26] *UBS Financial Services, Inc.*, 706 F.3d at 325.
[27] FINRA, RULE 0160 (2019).
[28] *See* 15 U.S.C. § 78s(b).
[29] 15 U.S.C. § 78o-3.
[30] Self-Regulatory Organizations; Order Approving Proposed Rule Change to Amend the Bylaws of NASD to Implement Governance and Related Charges to Accommodate the Consolidation of the Member Firm Regulatory Functions of the NASD and NYSE Regulation, Inc., 72 Fed. Reg. 42169-01 (Aug. 1, 2007).
[31] For a more detailed explanation of this process, see the section titled "Rule 12200 Imposes A Regulatory Obligation on FINRA Members."
[32] FINRA, *Enforcement*, Finra.org, https://www.finra.org/rules-guidance/enforcement (last visited Nov. 21, 2020).
[33] SEC. & EXCH. COMM'N, *Broker-Dealer Registration: Where to File*, SEC.gov, https://www.sec.gov/fast-answers/answersbrkrdlrhtm.html (last updated July 25, 2013).
[34] FINRA, RULE 12200 (2008).
[35] SEC. & EXCH. COMM'N, *Broker-Dealer Registration: Where to File*, SEC.gov, https://www.sec.gov/fast-answers/answersbrkrdlrhtm.html (last updated July 25, 2013).
[36] Kevin Carroll, *Securities Arbitration System Works Effectively and to the Benefit of Investors*, SIFMA, https://www.sifma.org/resources/news/securities-arbitration-system-works-effectively-and-to-the-benefit-of-investors/ (last visited Nov. 21, 2020); *see Arbitration and Mediation: Overview*, FINRA, http://www.finra.org/arbitration-mediation/overview (last visited Nov. 21, 2020). Many argue that arbitration offers parties "significant benefits []that are not available in court." Securities Arbitration System, Hearings Before the Subcomm. on Capital Markets, Insurance & Government Sponsored Enterprises of the H. Comm. on Financial Services, 109th Cong. 67 (2005) (statement of Marc E. Lackritz, President, Sec. Indus. Ass'n). However, parties may find litigation advantageous, hence why some broker-dealers want to avoid arbitration in some disputes. For instance, the broker-dealer may, in some instances, find that statutory and case law favors their opponent, but such laws would not necessarily bind an arbitrator's decision-making. *See The Advantages and Disadvantages of Arbitration v. Court Litigation*, TUCKER ARENSBERG ATTORNEYS (Feb. 13, 2015), https://www.tuckerlaw.com/2015/02/13/advantages-disadvantages-arbitration-vs-court-litigation/. Moreover, some reports claim that many broker-dealers fail to pay customers' arbitration awards. *See* Hugh D. Berkson, *Unpaid Arbitration Awards: A Problem the Industry Created — A Problem the Industry Must Fix*, PIABA.ORG, at 37,

Recently, some broker-dealers have sought to dodge Rule 12200 arbitration between themselves and large, institutional customers.[37] This scenario has involved instances where broker-dealers and customers detailed their relationship's terms in a long, often complex agreement (Customer Agreement). Some broker-dealers, when drafting Customer Agreements for these large, institutional customers, have included a forum-selection clause which designates a court in which to litigate.[38] While perhaps these broker-dealers had not considered FINRA Arbitration when drafting the Customer Agreements, when disputes ultimately arose, several firms have asserted that the customer waived Rule 12200 arbitration upon signing these Agreements.[39]

However, such a waiver raises key issues. As this Article will discuss below, the Circuit Courts of Appeals are split as to whether the parties must arbitrate or litigate, when the customer invokes their Rule 12200 right to arbitration, but that customer and their broker-dealer have already contracted to a forum-selection provision that has designated a court for litigation.[40] In each relevant case, a large, institutional customer and FINRA-member entered into a Customer Agreement.[41] Each Customer Agreement contained a substantially similar forum-selection clause, each which generally provided:

> The parties agree that all actions and proceedings arising out of this [Customer] Agreement or any of the transactions contemplated hereby shall be brought in the United States District Court in [a specific venue] and that, in connection with any such action or proceeding, submit to the jurisdiction of, and venue in, such court.[42]

D. *The Circuit Split*

The Second Circuit, in *Goldman Sachs & Co. v. Golden Empire Schools Financing Authority*, held that the Customer Agreement's forum-selection clause superseded Rule 12200.[43] The circuit noted that although federal policy presumptively favors arbitration, the presumption only holds when an arbitration agreement unambiguously covers the dispute.[44] Although the Circuit conceded that Rule 12200 constituted a written agreement to arbitrate, the Circuit believed the issue was whether the customer's

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https://piaba.org/system/files/pdfs/Unpaid%20Arbitration%20Awards%20-%20A%20Problem%20The%20Industry%20Created%20-%20A%20Problem%20The%20Industry%20Must%20Fix%20%28February%2025%2C%202016%29.pdf. Nevertheless, "the main component of legal costs associated with both arbitration and [litigation] is attorney's fees," so the expected length of each route should greatly influence the customer's decision. Alaina Gatskova, *Mend It, Don't End It: How to Improve Securities Arbitration in the United States*, 41 FORDHAM INT'L L. J. 1043, 1084 (2017).

[37] *See, e.g.*, Goldman, Sachs & Co. v. Golden Empire Schools Financing Authority, 764 F.3d 210 (2d Cir. 2014).

[38] *Id.*

[39] *Id.* at 212. The broker-dealer industry has historically defended PDAAs, which suggests that FINRA arbitration reduces broker-dealers' costs. Barbara Black, *Can Behavioral Economics Inform Our Understanding of Securities Arbitration*, 12 TENN. J. BUS. L. 107, 115 (2011). This does not necessarily mean that arbitration is unfair for customers: FINRA maintains that the customer's option to invoke arbitration is necessary to protect some small claims investors. *Id.* at 121. However, in the cases this paper examines, the broker-dealers tried to avoid arbitrating claims involving large, institutional investors; so, broker-dealers must find economic disadvantage in arbitrating those claims. *Id.* at 121. Interestingly, a 2011 paper predicted that when broker-dealers find arbitration disadvantageous, the industry will "mount opposition to [FINRA] Rule 12200." *Id.*

[40] *Compare* Goldman Sachs & Co v. Golden Empire Schools Financing Authority, 764 F.3d 210 (2d Cir. 2014) *with* UBS Financial Services, Inc. v. Carilion Clinic, 706 F.3d 319 (4th Cir. 2013).

[41] *Golden Empire Schools*, 764 F.3d at 212.

[42] *Id.*

[43] *Id.* at 217.

[44] *Id.* at 215.

Rule 12200 arbitration right remained in force, so the Circuit did not apply the presumption which would have favored arbitration.[45] Then, the Circuit argued that the forum-selection clause's language, in covering "all actions and proceedings," plainly superseded Rule 12200 arbitration, and thus required the parties to litigate in the designated court.[46]

Similarly, the Ninth Circuit, in *Goldman Sachs & Co v. City of Reno*, also held that the forum-selection clause superseded Rule 12200.[47] The court emphasized that arbitration is strictly a matter of consent between parties, and so parties can agree not to arbitrate.[48] While federal policy presumptively favors arbitration, the broker-dealer contested whether the customer's Rule 12200 arbitration survived rather than the scope of that right; so, like the Fourth Circuit, the Ninth Circuit did not presumptively favor arbitration.[49] Moreover, the Circuit reasoned that the forum-selection clause's language—"all actions and proceedings"—included FINRA arbitration because the Supreme Court, state courts, and FINRA Rules have all referred to arbitrations as "proceedings," and an agreement to bring a dispute to court is incompatible with bringing it to arbitration.[50] Therefore, Ninth Circuit found that the forum-selection clause had "sufficiently specific" language to alert the customer that it waived Rule 12200 arbitration.[51]

Contrarily, in *UBS Financial Services, Inc. v. Carilion Clinic*, the Fourth Circuit held that Rule 12200 superseded the forum-selection clause.[52] In short, the Fourth Circuit found that because the forum-selection clause's language failed to mention arbitration, it could only, at best, impliedly waive Rule 12200; therefore, the clause was insufficient to notify the customer that it waived Rule 12200 arbitration.[53] Indeed, the Fourth Circuit concluded that the forum-selection clause's "all actions and proceedings" language only included *all litigation*.[54] Note that because the Fourth Circuit's argument rested entirely on the forum-selection clause's imprecision, the opinion leaves future broker-dealers an opportunity to draft more precise clauses and thus avoid Rule 12200 in favor of forum-shopping.[55]

Likewise, in *Reading Health System v. Bear Sterns & Co.*, the Third Circuit held that Rule 12200 superseded the forum-selection clause.[56] The Third Circuit relied on two principles: (1) "a party signing a waiver must know what rights it is waiving" and (2) federal policy favors arbitration.[57] The Third Circuit found that the forum-selection clause was not "sufficiently specific" to notify the customer that it waived Rule 12200 arbitration.[58] Uniquely, the Circuit held that Rule 12200 is not a contractual right, but a regulatory right: "finding an implicit waiver would 'erode investors' ability to use an efficient and cost-effective means of resolving allegations of misconduct in the brokerage industry and thus undermine FINRA's ability to regulate, oversee, and remedy any such misconduct."[59]

I. EXCHANGE ACT § 29(A) LIKELY VOIDS THE FORUM-SELECTION CLAUSE

[45] *Id.*
[46] *Id.* at 217.
[47] Goldman Sachs & Co. v. City of Reno, 747 F.3d 733, 747 (9th Cir. 2014).
[48] *Id.* at 741.
[49] *Id.* at 742.
[50] *Id.* at 746.
[51] *Id.* at 743.
[52] UBS Financial Services, Inc. v. Carilion Clinic, 706 F.3d 319, 330 (4th Cir. 2013).
[53] *Id.* at 329.
[54] *Id.* This is also, in part, because this case's forum-selection clause mentioned "jury trials." *Id.*
[55] *See id.* at 328.
[56] Reading Health Sys. v. Bear Sterns & Co., 900 F.3d 87, 104 (3d Cir. 2018).
[57] *Id.* at 103.
[58] *Id.* at 102.
[59] *Id.* at 103.

A. *On Its Face § 29(a) Voids the Forum-Selection Clause*

The Courts of Appeals have not thoroughly addressed a statute which may provide a rule of decision.[60] The Securities Exchange Act of 1934's § 29(a), titled "Validity of Contracts" (as Dodd-Frank[61] amended in 2010) reads:

> SEC. 29. (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of *any rule of a self-regulatory organization*, shall be void[62] (emphasis added).

In short, if one reads § 29(a) at face-value, because FINRA is a SRO, the statute's plain meaning voids every contract-provision which waives compliance with FINRA Rule 12200—including the forum-selection clause.[63] The statute does not limit which SRO-rules or investors it covers.[64] If Congress did intend to limit the statute's broad language, it left that work to the Courts and the SEC.[65]

B. *McMahon's Holding and Underlying Concerns Suggest That § 29(a) Voids the Forum-Selection Clause*

The Supreme Court's 1987 decision *Shearson/American Exp., Inc. v. McMahon* is the most significant case in § 29(a)'s jurisprudence.[66] In *McMahon*, the parties signed a PDAA whereby they would arbitrate Exchange-Act claims between them.[67] The agreement created tension because Exchange Act § 27 gave District Courts exclusive jurisdiction over Exchange Act claims.[68] However, the Court held that § 29(a)

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[60] A Westlaw search reveals only one obvious reference to § 29(a) in any of the four aforementioned Circuit-court decisions. In a footnote, the Third Circuit held that it "need not" address whether § 29(a) voids the forum-selection clause because Rule 12200 is an unwaivable regulatory right. Reading Health Sys. v. Bear Sterns & Co., 900 F.3d 87, 104 n.83 (3d Cir. 2018). However, in a District Court case, *J.P. Morgan Securities LLC v. Quinnipiac University*, the Southern District of New York noted that the Second Circuit briefly addressed § 29(a) in a post-argument letter to *Golden Empire*, but the Circuit did not address § 29(a) in its official opinion. This led the Southern District to conclude that § 29(a) did not control. But, in the post-argument letter, the Second Circuit held that § 29(a) does not apply because *McMahon* stands for the principle that § 29(a) "only prohibits waiver of the substantive obligations imposed by the Exchange Act." J.P. Morgan Securities LLC v. Quinnipiac University, No. 14 Civ. 429 (PAE), 2015 WL 2452406, at *5 (S.D.N.Y. May 22, 2015).

[61] *See infra* Section C, titled "Dodd-Frank's Legislative History and Purposes Support Voiding the Forum-Selection Clause[,]" for a discussion on how Dodd-Frank affects one's reading of the rule.

[62] Securities Exchange Act of 1934, 15 U.S.C. § 78cc (2010). The regulation, which Congress amended in 2010, originally read "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this or of any rule or regulation thereunder, *or of any rule of an exchange required*, shall be void." *Id.* (emphasis added).

[63] *Id.* Professor Jill Gross of Pace Law School claims "To the extent courts have held in the past that parties could contract around FINRA rules, that line of cases seems to be vitiated by amended § 29(a)." *Second Circuit Holds Forum Selection Clause Trumps FINRA Arbitration Requirement*, INDISPUTABLY (Aug. 21, 2014), http://indisputably.org/2014/08/second-circuit-holds-forum-selection-clause-trumps-finra-arbitration-requirement/.

[64] Securities Exchange Act of 1934, 15 U.S.C. § 78cc (2010).

[65] This Article will provide more information on the SEC's interpretation in the subsection titled "Dodd-Frank's Legislative History and Purposes Support Voiding the Forum-Selection Clause." For information about Courts' recent interpretations, see *supra* note 60.

[66] *See, e.g.*, J.P. Morgan Securities v. Quinnipiac University, No. 14 Civ. 429 (PAE), 2015 WL 2452406, at *5 (S.D.N.Y. 2015) (observing that the *McMahon* Court said § 29(a) "only prohibits waiver of the substantive obligations imposed by the Exchange Act" and concluding that § 29(a) presents no barrier to contracting-around Rule 12200).

[67] Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 228 (1987).

[68] *Id.* at 227.

"only prohibits waiver of the [Exchange Act's] substantive obligations;" that is, the Exchange Act's "[duties] with which [broker-dealers] must 'comply.'"[69] The Court concluded that § 27 did not create any broker-dealers' duty for the PDAA to waive, so the PDAA did not waive "compliance" with any Exchange-Act obligation.[70]

Although some Courts disagree,[71] the *McMahon* holding suggests that the Customer Agreement's forum-selection clause violates § 29(a) as amended in 2010.[72] Unlike waiver of § 27, which implicated no Exchange-Act obligation (defined as a "duty with which [broker-dealers] must comply,") § 78s(g) requires FINRA to enforce broker-dealers' compliance with Rule 12200.[73] Rule 12200 obligates broker-dealers to arbitrate at their customers' request.[74] Thus, broker-dealers cannot evade Rule 12200 arbitration without waiving compliance with an Exchange-Act obligation in violation of § 29(a).[75]

Moreover, the *McMahon* Court also expresses two underlying concerns which suggest applying § 29(a) to void contractual waivers of Rule 12200.

First, the *McMahon* Court intended to further the "federal policy favoring arbitration" whereby Courts "rigorously [enforce] agreements to arbitrate."[76] Indeed, the FAA created a "liberal federal policy favoring arbitration."[77] The weight of jurisprudence agrees that Rule 12200 constitutes a written

[69] *Id.* Some lower courts lend support to this reading. *See, e.g.*, Gay v. CreditInform, 511 F.3d 369, 385 (3d Cir. 2007) (Echoing "Because § 27 does not impose any statutory duties, its waiver does not constitute a waiver of 'compliance with any provision' of the Exchange Act under § 29(a)"). But some of *McMahon*'s progenies exempt choice of forum from the "substantive rights" the Exchange Act affords. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (U.S. 1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"). However, Rule 12200 is not a mere forum-selection clause: it is a duty the broker agreed to undertake in exchange for its FINRA membership, which the Exchange Act demands FINRA enforce. 15 U.S.C. § 78s(g)(1).

[70] *McMahon*, 482 U.S. at 228. This holding caused the SEC to repeal Rule 15c2-2, which declared it fraudulent for Customer Agreements to include mandatory-arbitration provisions. *See* FINRA, *Notice to Members 83-73: SEC Adopts Rule 15c2-2 Governing Binding Arbitration Clauses in Customer Agreements*, FINRA, https://www.finra.org/rules-guidance/notices/83-73 (last visited Nov. 21, 2020).

[71] This paper's interpretation is controversial. For instance, the Second Circuit (generally) only applies § 29(a) to void "blanket releases of liability" which is narrower than this Article's interpretation of § 29(a) suggests. Pasternack v. Shrader, 863 F.3d 162, 171 (2d Cir. 2017). For a brief on how Circuits have applied § 29(a) to waivers of Rule 12200, see *supra* note 60.

[72] *Id.* at 238.

[73] *See* 15 U.S.C. § 78s(g)(1). The Exchange Act expressly allows the SEC to relieve SROs from enforcing compliance with their rules. 15 U.S.C. § 78s(g)(2). The SEC has not relieved FINRA from its Rule 12200 enforcement-obligation concerning contractual waivers of Rule 12200.

[74] FINRA, RULE 12200 (2008).

[75] *McMahon*, 482 U.S. at 238. This paper's interpretation is controversial. For instance, the Second Circuit (generally) only applies § 29(a) to void "blanket releases of liability" which is narrower than this Article's interpretation suggests. Pasternack v. Schrader, 853 F.3d 162, 171 (2d Cir. 2017). However few Courts have examined how § 29(a) interacts with waivers of Rule 12200. For a brief primer on those decisions, see *supra* note 60.

[76] *McMahon*, 482 U.S. at 226.

[77] CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012).

agreement to arbitrate at the customer's request.[78] Consequently, voiding the forum-selection clause to enforce Rule 12200 would advance a federal policy *McMahon* embraced.[79]

Second, the *McMahon* Court reasoned that § 29(a) attempts to void clauses which "weaken[] [a party's] ability to recover under the Exchange Act."[80] While *McMahon* argued that litigation and arbitration afford customers identical "rights to which [they are] entitled," *McMahon* did not suggest that the forums afford customers identical procedures.[81] For instance, a customer with limited need for discovery-procedures might find FINRA's limited discovery-procedures advantageous, considering the extensive discovery-procedures that a court of law would afford the broker-dealer.[82] Similarly, a customer with evidence inadmissible in federal court may prefer arbitration because federal evidence rules do not bind FINRA tribunals.[83] In addition, arbitration is an equitable forum, and customers, especially those with compelling equitable arguments, "likely [] benefit from equitable, rather than legalistic, resolution of their disputes."[84] In short, by foreclosing the customer's access to arbitration, a waiver of Rule 12200 weakens a customer's ability to recover insofar as arbitration would have afforded the customer comparative procedural advantages to litigation.[85] On the other hand, a broker-dealer might also find arbitration advantageous; for example, the broker-dealer might know the arbitrator.[86] Nevertheless, Rule 12200 grants each customer procedural power to choose arbitration when it comparatively benefits them under the circumstances, thereby facilitating their recovery under the Exchange Act.[87]

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[78] *See* Waterford Inv. Serv., Inc. v. Bosco, 682 F.3d 348, 353 (4th Cir. 2012). *See also* Washington Square Sec., Inc., v. Aune, 385 F.3d 432, 435 (4th Cir. 2004) (where the National Association of Securities Dealers' Rules constituted a written agreement to arbitrate); *see also* UBS Financial Serv., Inc. v. West Virginia University Hosp., Inc., 660 F.3d 643, 649 (2d Cir. 2011); *see also* Goldman Sachs & Co v. Golden Empire Schools Fin. Auth., 764 F.3d 210, 213 (2d Cir. 2014) (assuming that FINRA Rule 12200 is a written agreement to arbitrate). While parties can generally contract out of arbitration, in our scenario, the broker-dealer's obligation to arbitrate at the customer's request arises out of the broker-dealer's FINRA membership-filings, not out of contract with the customer. Thus, the customer and broker-dealer cannot contract out of it. *See* FINRA, UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER (FORM U–4), SECTION 15A (2009) (page 15), https://www.finra.org/registration-exams-ce/broker-dealers/registration-forms/form-u4.

[79] *McMahon*, 482 U.S. at 276.

[80] *See id*. at 230–31. Whether a waiver "weakens [a party's] ability to recover under the Exchange Act" is the crux of the Second, Third, and Ninth Circuits' § 29(a) analysis. *See* Harsco Corp. v. Segui, 91 F.3d 337, 343 (2d Cir. 1996); *see also* AES Corp. v. Dow Chemical Co., 325 F.3d 174, 179 (3d Cir. 2003); *see also* Facebook, Inc v. Pacific Northwest Software, Inc., 640 F.3d 1034, 1041 (9th Cir. 2011) (focusing on whether an agreement "[purports] to limit or waive [one's] right to sue.").

[81] *McMahon*, 482 U.S. at 231. In *McMahon*, the Court agreed with the SEC as amicus curiae which argued that "arbitration procedures proscribed by SROs are adequate to enforce the rights of customers against brokerage firms." Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Petitioners, Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220 (1987) (No. 86-44), 1986 WL 727882 at 13.

[82] *See* Irene C. Warshauer, *Electronic Discovery*, 2 THE NEUTRAL CORNER: THE NEWSLETTER FOR FINRA NEUTRALS (2011).

[83] FINRA, RULE 12604 (2008).

[84] Barbara Black, *The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?*, 72 U. CIN. C. L. 415, 454 (2003).

[85] FINRA RULE 2268(d) suggests that FINRA concurs with this position. "(d) No [PDAA] shall include any condition that: (1) limits or contradicts the rules of any self-regulatory organization; (2) limits the ability of a party to file any claim in arbitration; (3) limits the ability of a party to file any claim in court . . ." *See* FINRA, RULE 2268 (2011). The SEC approval order to Rule 2268 also agrees, stating that "The Commission believes that the new provision . . . benefits investors" in part, because it prevents "limit[ing] SRO forums otherwise available to parties." *See* Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., and the American Stock Exchange, Inc., Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, 54 Fed. Reg. 21144-03 (May 16, 1989).

[86] *See* Barbara Black, *Is Securities Arbitration Fair to Investors?*, 25 PACE L. REV. 1, 7 (2004).

[87] *See* FINRA, RULE 12200 (2008).

C. *Dodd-Frank's Legislative History and Purposes Support Voiding the Forum-Selection Clause*

The *McMahon* Court noted that Congress's intent to preclude waiver "will be deducible from the statute's . . . legislative history" or from a conflict between waiver and "the statute's underlying purposes."[88]

An analysis of § 29(a)'s legislative history and purposes reveals that Congress likely intended for the statute to void waivers of Rule 12200.[89] The Senate Report to the 2010 Amendment stated that the amendment's purpose was to "provide[] equal treatment for the rules of all SROs under [§] 29(a)."[90] Indeed, Congress passed the 2010 Amendment, in part, to prevent broker-dealers from dodging FINRA regulations.[91] In so doing, albeit in reference to PDAAs, the Executive Branch,[92] Congress,[93] and the Exchange Act[94] itself all sought to prohibit broker-dealers from forum-selecting via customer contracts. They all advocated for the customer's choice to select a judicial forum,[95] but many Customer Agreements are adhesive,[96] thus one can expect customers' Rule 12200 right to promote the customer-choice more frequently than customers' often-empty freedom to negotiate a forum-selection provision. Although large,

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[88] Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 227 (1987).

[89] *See* S. REP. NO. 111-176, at 244 (2010).

[90] *Id.* Congress likely intended for the provision—not only to regulate broker-dealers' conduct—but as one of many reforms to bolster and streamline financial-sector regulations. *See, e.g.*, *Regulatory Restructuring and Reform of the Financial System: Hearing Before the Committee on Financial Services*, 110th Cong., 110-143 (2008) (statement of Joseph E. Stiglitz, Professor, Colombia University) (saying "The rules need to be . . . simple . . . and transparent [enough], so that everybody, including Congress, can see on an ongoing basis whether there is enforcement."). *See also, e.g.*, *Committee on Senate Financial Crisis Inquiry Commission*, 111th Cong. (2010) (statement of Denise Voigt Crawford, President, North American Security Administrators Association) (declaring that "Deregulation is no longer the presumptive policy prescription; indeed today, the sense is that the current crisis was deepened by excessive deregulation."). Furthermore, allowing broker-dealers to waive certain FINRA rules would have arguably unconscionable effects; for example, firms could waive their Rule 2165 supervisory obligations designed to protect seniors from growing threats of financial exploitation. FINRA, *2165. Financial Exploitation of Specified Adults*, FINRA.org, https://www.finra.org/rules-guidance/rulebooks/finra-rules/2165 (last visited Nov. 21, 2020).

[91] *See* S. REP. NO. 111-176, at 244 (2010) (stating vaguely that Title IX, Subtitle B, of which § 29(a) is a part, "relates to enforcement issues.").

[92] The Obama Administration's Treasury Department took a firm stance against broker-dealers forum-selecting via PDAAs. *See* Dep't of the Treasury, *Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation*, 72 (2009), https://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf (recommending "The SEC should study the use of mandatory arbitration clauses in investor contracts. . . . [M]andating a particular venue and up-front method of adjudicating disputes – and eliminating access to courts – may unjustifiably undermine investor interests. We recommend legislation that would give the SEC clear authority to prohibit mandatory arbitration clauses in broker-dealer and investment advisory accounts with retail customers."); *see also* Dep't of the Treasury, *Fact Sheet: Administration's Regulatory Reform Agenda Moves Forward Legislation for Strengthening Investor Protection Delivered to Capitol Hill* (July 10, 2009), https://www.treasury.gov/press-center/press-releases/Pages/tg205.aspx (echoing that "mandating a particular venue and up-front method of adjudicating disputes – and eliminating access to courts – may unjustifiably undermine investor interests.").

[93] *See, e.g.*, 156 Cong. Rec. H5233-01 (2010) (arguing that "[S]ecurities industry practices have deprived investors of a choice when seeking dispute settlement, too. In particular, pre-dispute mandatory arbitration clauses inserted into contracts have limited the ability of defrauded investors to seek redress." – Rep. Barney Frank (D-MA)).

[94] *See* S. REP. NO. 111-176, at 109–10 (2010) (adding 15 U.S.C. § 78o(o) to the Exchange Act, which gave the SEC greater authority to restrict mandatory arbitration provisions that brokers insert into Customer Agreements).

[95] *Supra* notes 92–94.

[96] *See* Richard E. Spidel, *Contract Theory and Securities Arbitration: Whither Consent?* 62 BROOK. L. REV. 1335, 1349–50 (1996). An adhesive contract is as contract where "a contracting party with superior bargaining strength presents a standardized form agreement to a party of lesser bargaining power and requires that party to either accept or reject its terms without an opportunity for negotiation." Ilan v. Shearson/American Express, Inc., 632 F.Supp. 886, 890 (S.D.N.Y. 1985).

sophisticated investors have plenty of bargaining power, Congress likely intended for the 2010 Amendment to benefit investors of all sizes: the Congressional record is strewn with references to Bernie Madoff[97] (who had recently defrauded banks, hedge funds and individual investors via the largest Ponzi Scheme in history.)[98] Therefore, when a Court limits the application of § 29(a)'s plain text as to exclude Rule 12200, the Court ignores Congress's implicit intent.[99]

Both Congress[100] and the Executive[101] also intended for Dodd-Frank to close regulatory gaps. Towards this end, Dodd-Frank primarily sought to address the "fragmentation" of federal responsibility for consumer protection across multiple agencies.[102] So, § 913 "direct[ed] the SEC to . . . study . . . whether there are legal or regulatory gaps or overlap in legal or regulatory standards in the protection of retail customers."[103] In the SEC's study, the Commission concluded that § 29(a) prohibits waiver of the broker-dealer's "business conduct obligations."[104] But, the Commission, in a footnote, added a broad addendum: "Dodd-Frank Act . . . amended [§] 29(a) to make it applicable to *any waivers* relating to rules . . . of an SRO."[105] The study provided no further explanation about the footnote,[106] but the footnote's breadth accords with some of the SEC's previous statements, suggesting § 29(a) voids waivers of Rule 12200.[107]

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[97] *See* 156 Cong. Rec. H5233-01 (2010) (wherein Congresspeople mentioned Madoff nine times); *see also* S. REP. NO. 111-176 (wherein Congresspeople mentioned Madoff forty-eight times).
[98] For information about the Madoff Scandal, see *Bernie Madoff*, BRITANNICA, http://www.britannica.com/biography/Bernie-Madoff (last visited Nov. 26, 2020).
[99] *See* S. REP. No. 111-176, at 114 (2010).
[100] *See also* Jennifer Liberto, *SEC Investigation: We Missed Madoff*, CNN MONEY (Sep. 2, 2009), https://money.cnn.com/2009/09/02/news/economy/Madoff_SEC_investigation/index.htm (quoting Senator Chris Dodd, "The inspector general's report [of the Madoff Scandal] lays out the string of massive regulatory failures and incompetent investigations at the SEC that led to unimaginable loss for so many.").
[101] Elise B. Walter, Commissioner, Securities and Exchange Commission, Principles to Help Guide Financial Regulatory Reform (Mar. 2, 2009) (arguing that "[It is not] sensible for a regulatory system to incorporate unnecessarily duplicative jurisdiction."). *See also*, Inspector General H. David Kotz, *Report of Investigation: Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme, U.S. Securities and Exchange Commission, Office of the Inspector General*, 22 (Aug. 31, 2009), https://www.sec.gov/files/oig-509-exec-summary.pdf (concluding that "the SEC never properly examined or investigated Madoff's trading and never took the necessary, but basic, steps to determine if Madoff was operating a Ponzi scheme.").
[102] *See* S. Rep. No. 111-176, at 10 (2010).
[103] *Id.* at 105.
[104] Sec. & Exch. Comm'n, *Study on Investment Advisors and Broker-Dealers*, 51 (Jan. 2011), https://www.sec.gov/news/studies/2011/913studyfinal.pdf. "Broker-dealers are subject to a comprehensive set of statutory, Commission and SRO requirements that are designed to promote business conduct that, among other things, protects investors from abusive practices, including practices that are not necessarily fraudulent." *Id.*
[105] *Id.* (emphasis added).
[106] *Id.*
[107] For instance, examine the approval order to FINRA Rule 2268(d), which stated that "The Commission believes that [Rule 2268] . . . benefits investors" in part, because it prevents "limit[ing] SRO forums otherwise available to parties." *See* Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., and the American Stock Exchange, Inc., Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, 54 Fed. Reg. 21144-03 (May 16, 1989). *See also* Brief of the Securities and Exchange Commission, Amicus Curiae, Roney & Co. v. Goren, 875 F.2d 1218 (2d Cir. 1988) (No. 88-1874) (noting "If broker-dealers are allowed to avoid the application of SRO arbitration rules by enforcing conflicting provisions written into customer contracts, the customer protections afforded by those rules and the SRO arbitration system will be undermined and investor confidence in the system will be eroded.").

Regardless, if § 29(a) controls, the customer's right to Rule 12200 arbitration supersedes the forum-selection and the Circuits' debate is likely over: the customer can likely invoke their Rule 12200 right.[108] So, the following discussion will presume—*in arguendo*—that § 29(a) does not control.[109]

II. RULE 12200 IS UNWAIVABLE

Some Courts—plus FINRA—hold that Rule 12200 is an unwaivable regulatory right rather than (or in addition to) an agreement to arbitrate.[110] Under this view, the customer can invoke their Rule 12200 right to arbitrate despite signing the Customer Agreement.[111]

A. *FINRA's Interpretation of Rule 12200's May Control*

Some limited case law suggests that FINRA's interpretation of Rule 12200 may control: the cases denote where a Circuit Court deferred to an SEC-supervised SRO's interpretation of the SRO's own rule.[112] For instance, in 1996, the Second Circuit deferred to the NASD when the Circuit prohibited NASD-members from forcing employees to waive their arbitration rights.[113] The Circuit reasoned that when the SEC approves an SRO-rule, the rule expresses federal policy.[114] The Second Circuit reaffirmed its "obligation" to defer to SROs as recently as 2009.[115] Likewise, in the 1970's, the Fifth Circuit deferred to AMEX-interpretations of AMEX-rules to "keep with the Congressional purpose of making the Exchange a self-regulatory body."[116] This short line of cases reasoned that, if a Court substitutes Congressional will with its own will, the Court will undermine Congress's regulatory scheme.[117]

The most noteworthy case on this topic is a 2011 decision: *Charles Schwab & Co. Inc. v. FINRA*, wherein a Ninth Circuit District Court conflated the SEC and FINRA.[118] This case involved the interpretation of FINRA Rule 2268(d), which provides that "(d) No [PDAA] shall include any condition that: (2) limits the ability of a party to file any claim in arbitration."[119] Contrary to FINRA's interpretation, the plaintiff argued that Rule 2268(d) did not prohibit class-action waivers within Customer Agreements.[120] The Court

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[108] *See* Securities Exchange Act of 1934, 15 U.S.C.A § 78cc.
[109] *See id.*
[110] Reading Health System v. Bear Sterns & Co., 900 F.3d 87, 103 (3d Cir. 2018) (noting that "[the customer's] right to arbitrate is not contractual in nature, but rather arises out of a binding, regulatory rule that has been adopted by FINRA and approved by the SEC"). FINRA, *Regulatory Notice 16-25: Forum Selection Provisions* (July 2016). The Sixth Circuit has not directly weighed in but appears to support this theory. Wilson-Davis & Co., v. Mirgliotta, 721 Fed. App'x. 425, 427 (6th Cir. 2018) ("FINRA Rules 'create the right of parties to compel a FINRA-member firm to arbitrate even in the absence of a direct transactional relationship with the firm.'"). Further, prior to *Goldman, Sachs & Co.* the Second Circuit appeared to support this theory. *See* Thomas James Assocs. v. Jameson, 102 F.3d 60 (2d Cir. 1996) (holding that parties cannot waive SRO-granted arbitration rights).
[111] FINRA, *Regulatory Notice 16-25: Forum Selection Provisions* (July 2016) ("the mandatory nature of the FINRA rules' requirement that FINRA arbitration must be available upon the customer's request, even in the absence of an agreement to arbitrate.")
[112] *See, e.g.*, Thomas James Assocs. v. Jameson, 102 F.3d 60, 66 (2d Cir. 1996).
[113] *See id.*
[114] *Id.*
[115] Heath v. SEC, 586 F.3d 122, 139 (2009) ("we acknowledge our obligation to afford some level of deference to [the SEC and NYSE's] interpretation of the NYSE rules.").
[116] Intercontinental Industries, Inc. v. American Stock Exchange, 452 F.2d 935, 940 (5th Cir. 1971).
[117] *See* Blank v. New York Stock Exchange, Inc., No. 80 Civ. 1297 & 1280, 1980 WL 1415 (S.D.N.Y. 1980); *see also* Zuckerman v. Yount, 362 F. Supp. 858, 863 (N.D. Ill., 1973). Congress's own statements support this assumption. *See* S. Rep. No. 94-75, at 24 (1975).
[118] *See generally* Charles Schwab & Co. v. FINRA, 861 F. Supp. 2d 1063 (N.D. Cal. 2012).
[119] FINRA Rule 2268 (2011).
[120] *Charles Schwab & Co.*, 861 F. Supp. 2d at 1064.

rejected this argument, referring to FINRA and the SEC collectively as an agency, before deferring to FINRA and the SEC's combined "expertise . . . regarding resolution of customer disputes with the broker-dealers that FINRA regulates."[121] It analogized the SEC-FINRA relationship to the relationship between Administrative Law Judge proceedings and an agency's internal appeals-like review.[122] The Court acknowledged that FINRA might misinterpret the rule, but noted that "the court of appeals has the final word and can correct any error."[123]

If a court conflates the SEC and FINRA, then *Kisor v. Wilkie* becomes relevant.[124] *Kisor* established that a Court must defer to an agency's interpretation of the agency's own regulation when (1) the regulation is genuinely ambiguous, (2) the agency's interpretation is official, and (3) and the interpretation reflects "fair and considered" judgment.[125]

First, Rule 12200 is genuinely ambiguous. A statute is genuinely ambiguous, if ambiguity exists after considering its "text, structure, history, and purpose."[126] While this Article advances that Rule 12200 is an unambiguous regulatory right,[127] Circuits have come to split conclusions about Rule 12200's nature when weighing the rule's "text, structure, history, and purpose."[128]

Second, FINRA's interpretation is official. FINRA outlined its official interpretation in Regulatory Notice 16-25: "any member firm's denial, limitation or attempt to deny or limit a customer's right to request FINRA arbitration, even if the customer seeks to exercise that right after having agreed to a forum selection clause specifying a venue other than a FINRA arbitration forum, would violate FINRA Rules 2268 and 12200."[129]

Third, FINRA's interpretation reflects "fair and considered" judgment. An agency's interpretation is "fair and considered" unless the agency formed its position as "merely a convenient litigation position" or as a means to "defend an agency position against attack."[130] The interpretation also cannot create "unfair surprise" to regulated parties.[131] Here, FINRA formed its conclusion apart from litigation, and FINRA has never held a contrary position.[132]

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[121] *Id.* at 1078.
[122] *Id.* at 1071.
[123] *Id.* at 1077.
[124] Kisor v. Wilkie, 139 S. Ct. 2400 (2019).
[125] *Id.* at 2415–18.
[126] *Id.*
[127] *See infra*, Section IIB, titled "Rule 12200 Imposes A Regulatory Obligation on FINRA Members."
[128] *Compare* holdings which emphasize legislative history, such as *Goldman Sachs & Co v. Golden Empire Schools Financing Authority*. 764 F.3d 210, 214 (2d Cir. 2014) (citing legislative history to conclude that " Rule 12200 is a written agreement to arbitrate with customers . . . enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract") *with* holdings that emphasize procedural history like *Reading Health Sys. v. Bear Sterns & Co.* 900 F.3d 87, 103 (3d Cir. 2018) (noting that "[the customer's] right to arbitrate is not contractual in nature, but rather arises out of a binding, regulatory rule that has been adopted by FINRA and approved by the SEC").
[129] FINRA, *Regulatory Notice 16-25: Forum Selection Provisions* (July 2016).
[130] *Kisor*, 139 S. Ct. at 2417.
[131] *Id.*
[132] FINRA, *Regulatory Notice 16-25: Forum Selection Provisions* (July 2016). FINRA also articulated their opinion on this subject over a decade ago, noting that "Fail[ure] to submit a dispute for arbitration under the Code as required by the Code" constitutes "conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member." *See* FINRA, IM-2200 (2008).

Admittedly, SRO-deference is harder to justify than agency-deference.[133] Courts justify agency-deference because agencies have expertise in the subject-matters they regulate, and democratic forces—namely, the President—can hold agencies politically accountable.[134] For instance, the President can hold the SEC accountable by hiring SEC Commissioners, or firing them for "inefficiency, neglect of duty, or malfeasance in office."[135] Although SROs have similar expertise as agencies, SROs are not politically accountable.[136] For example, FINRA's Board of Governors is accountable to the industry, the company each member represents, and the Board itself: one can become a Governor only if (1) certain industry-members elect them or (2) the Board of Governors appoints them.[137] No publicly-elected actor can remove FINRA Governors.[138]

B. *Rule 12200 Imposes A Regulatory Obligation on FINRA Members*

Rule 12200 is regulatory in nature because (1) Rule 12200 had to pass a number of official channels before binding FINRA-members, (2) Congress, through the Exchange Act, made FINRA rules unwaivable and regulatory, and (3) waiver of Rule 12200 will frustrate the Exchange Act's purposes.

First, FINRA Rule 12200 underwent a number of official channels, which all FINRA rules must undergo.[139] Specifically, FINRA first solicited comments on the rule to revise it.[140] Then, FINRA filed the proposed rule to the SEC for review.[141] The SEC then determined whether the rule was consistent with the Exchange Act, and either amended the rule or asked FINRA to adjust it accordingly.[142] When the SEC approved the rule, the SEC announced the rule in the Federal Register.[143] The SEC then subjected the rule to another public comment period, and the SEC either required FINRA to respond to comments or amend the rule.[144] When the SEC approved the final rule, it published notice in the Federal Register.[145] Per

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[133] Courts may also find that contrary, binding authorities override FINRA's opinion. *See, e.g.*, New York Bay Capital, LLC v. Cobalt Holdings, Inc., 456 F. Supp. 3d 564, 573 (S.D.N.Y. 2020) (stating that "The Court must follow binding precedent, even if it conflicts with FINRA guidance on the issue"). *See, e.g.*, Goldberg v. Bruderman Bros., LLC, Nos. 159280/2019, 65979/2019, 2020 WL 6161619, at *6 (N.Y. 2020) ("This court's preference is to respect . . . the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York . . . notwithstanding FINRA's self-promulgated rules.")
[134] Emily Hammond, *Double Deference in Administrative Law*, 116 COLUMBIA L. REV. 1705, 1757 (2016).
[135] *See* Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 487 (2010). *But see The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781, 786 (2013) (noting that the Exchange Act is silent on whether the President requires cause to fire SEC Commissioners; arguing that the President can fire Commissioners at-will).
[136] *See Free Enterprise Fund*, 561 U.S. at 487.
[137] FINRA, *FINRA Board of Governors*, https://www.finra.org/about/governance/finra-board-governors (last visited Jan. 13, 2021).
[138] *Id.*
[139] *See* FINRA, *FINRA Rulemaking Process*, https://www.finra.org/rules-guidance/rulemaking-process (last visited Nov. 21, 2020).
[140] *See id.*
[141] *See id.*
[142] *See id.* "The SEC almost never disapproves a rule; the 'understanding' is that SEC review is deferential." Emily Hammond, *Double Deference in Administrative Law*, 116 COLUMBIA L. REV. 1705, 1736 (2016). The SEC only rejected one FINRA Rule between 2009 and 2011. *Id.* at 1737-1738.
[143] FINRA, *FINRA Rulemaking Process*, https://www.finra.org/rules-guidance/rulemaking-process (last visited Nov. 21, 2020).
[144] *See id.*
[145] *See id.*

Exchange Act § 19(b), when the SEC approves FINRA rules, those rules have the force of federal law,[146] and parties to a contract cannot waive federal laws.[147]

Second, Congress made FINRA Rules unwaivable and regulatory through the Exchange Act.[148] In fact, if broker-dealers can waive FINRA Rules, Congress suggested that the Exchange Act will fail.[149] A Senate report on the Exchange Act (which the *McMahon* court expressly endorsed)[150] noted:

> The [SROs] must exercise governmental-type powers if they are to carry out their responsibilities under the Exchange Act. When a member violates the Act or a [SRO's] rules, the organization must be in a position to impose appropriate penalties or to revoke relevant privileges.[151]

Regarding FINRA, Congress specifically noted that, if FINRA cannot enforce its rules against FINRA-members, it would undermine the Exchange Act's function of properly regulating and overseeing brokerage firms.[152]

In fact, Congress passed § 19(g) which *demands* that FINRA enforce its rules.[153] As the statute says, in part,

> [FINRA] shall comply with . . . its own rules, and . . . absent reasonable justification or excuse enforce compliance— (B) . . . with such provisions[.][154]

§ 19(g) requires FINRA to enforce Rule 12200.[155] It does not distinguish which rules it obligates FINRA to enforce: the language is broad on its face.[156] Furthermore, Courts often defer to the SEC,[157] and the SEC has indicated support for a broad reading of § 19(g).[158] In this light, if a Court would permit private

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[146] 15 U.S.C. § 78s(b)(1).
[147] SEC-approved SRO rules preempt state law. *See* Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1128 (9th Cir. 2005).
[148] *See* James C. Treadway Jr, Commissioner, Securities and Exchange Commission, Remarks to the American Law Institute, *Philosophizing About Self-Regulation in a Deregulatory Environment*, ABA Conference on Broker-Dealer Regulation (Jan. 12, 1984) (saying that Congress intended for the Exchange Act to "[let] the exchanges take the leadership with government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well-oiled, cleaned, ready to use but with the hope that it would never have to be used.").
[149] S. Rep. No. 94-75, at 24 (1975).
[150] Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 230 (1987).
[151] S. Rep. No. 94-75, at 24 (1975).
[152] FINRA, *Regulatory Notice 16-25: Forum Selection Provisions* (July 2016). The Third Circuit has echoed this sentiment. Reading Health System v. Bear Sterns & Co., 900 F.3d 87, 103 (3d Cir. 2018).
[153] 15 U.S.C. § 78s(g)(1).
[154] *Id*. *See also* Commissioner Luis A. Agular, *The Need for Robust SEC Oversight of SROS*, SEC. & EXCH. COMM'N (May 18, 2013), https://www.sec.gov/news/public-statement/2013-spch050813laahtm ("SROs are [] required to enforce compliance by their members with the federal securities laws, and discipline their members for violations of such laws and the SRO's own rules.")
[155] *See* 15 U.S.C. § 78s(g)(1).
[156] *Id*. Although, no private action arises when an SRO fails to follow statutes or rules, except in instances of fraud or bad faith. Brawer v. Options Clearing Corp., 807 F.2d 297, 299 (2d Cir. 1986).
[157] Because the statute is silent on which rules it covers, if the SEC would pass an interpretative rule that favors a broad reading, the Court would grant the SEC *Chevron* deference. Then, the interpretation would hold as long as it is reasonable. *See* Stryker v. S.E.C., 780 F.3d 163, 165 (2d Cir. 2015); *see also* Digital Realty Tr., Inc. v. Sommers, 138 S. Ct. 767, 773 (2018) (noting that Dodd-Frank granted "power, assistance, and money" to the SEC, but withholding deference because the statue resolved the issue on its face).
[158] The SEC wants to prevent SROs from "being less inclined to enforce rules vigorously against financially supportive members, issuers, and shareholders." Commissioner Agular, *supra* note 154.

parties to contract-around Rule 12200, it would also permit them to contract-around the Congressional mandate that FINRA enforce the Rule.[159]

Third, Congress passed the Exchange Act, in part, to "protect investors."[160] But, waivers of Rule 12200 frustrate the Exchange Act's investor-protection capacity.[161] Historically, both the SEC and brokerage firms have asserted that, when customers cannot access arbitration, the comparative cost of litigation will sometimes deter them from bringing small yet meritorious claims.[162] Although the Circuit split involves large customers with large claims, the literature affirms that both small[163] and large[164] customers will often, but not always, find FINRA arbitration advantageous. This is, in large part, due to the aforementioned procedural differences between litigation and arbitration.[165]

Congress also passed Exchange Act § 15A(b), in part, to "promote just and equitable principles of trade."[166] But, when broker-dealers defy or ignore their Rule 12200 obligations, they also violate their binding duty to comply with just trade principles.[167] FINRA has established that:

> [A] failure to . . . arbitrate [per Rule 12200] violate[s] FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade).[168]

FINRA's conclusion echoes its predecessor, the NASD, which held a similar position:

> The NASD's Board of Governors has determined to interpret actions by members requiring associated persons to waive the arbitration of disputes as conduct inconsistent with just and equitable principles of trade and thus a violation of Article III, section 1 of the Rules of Fair Practice.[169]

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[159] *See* 15 U.S.C. § 78s(g)(1).
[160] *Id*.
[161] *See* FINRA, *Regulatory Notice 16-25: Forum Selection Provisions* (July 2016); *see also* Brief of the Securities and Exchange Commission, Amicus Curiae, Roney & Co. v. Goren, 875 F.2d 1218 (2d Cir. 1988) (No. 88-1874) (noting "If broker-dealers are allowed to avoid the application of SRO arbitration rules by enforcing conflicting provisions written into customer contracts, the customer protections afforded by those rules and the SRO arbitration system will be undermined and investor confidence in the system will be eroded.").
[162] *See White Paper on Arbitration in the Securities Industry*, at 1, SEC (Oct. 2007), at https://www.sifma.org/wp-content/uploads/2017/03/White-Paper-on-Arbitration-in-the-Securities-Industry-October-2007.pdf; *see also* Brief for Respondent, at *17, Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 447 (1989) (No. 88-385) 1988 WL 1026310 (appearing before the Supreme Court, the broker-dealer argued that "The Court in *McMahon* was justified in relying on the SEC's oversight jurisdiction in ruling that SRO arbitration forums are adequate to resolve federal securities law disputes."); *see also* Brief for the Securities and Exchange Commission, Roney & Co. v. Goren, 875 F.2d 1218 (6th Cir. 1989).
[163] For a discussion of the comparative costs of arbitration and litigation, see *supra* note 36.
[164] The cases in the Circuit split evidence broker-dealers' intent to avoid fighting large claims in FINRA arbitration: for those claims, broker-dealers find arbitration against their financial interest. *See* Barbara Black, *supra* note 39, at 121. Conversely, arbitration benefits the sophisticated customers who bring those large claims. Indeed, in the Circuit split, the knowledgeable customers (who know whether arbitration is in their best financial interest) *want* to arbitrate; *see id*.
[165] *Supra* notes 82–87.
[166] 15 U.S.C. § 78o–3(b)(7).
[167] Amicus Curiae Brief of Public Investors Arbitration Bar Association in Support of Plaintiff-Appellee, Reading Health System v. Bear Sterns & Co., 900 F.3d 87 (3d Cir. 2018) (No 16-4234), 2017 WL 2255647.
[168] FINRA, *Regulatory Notice 16-25: Forum Selection Provisions* (July 2016).
[169] Self-Regulatory Organizations; Proposed Rule Change by National Association of Securities Dealers Relating to Amendments to Code of Arbitration Procedure, 52 Fed. Reg. 9232-01, 9232 (Mar 23, 1987). When relying on the NASD's conclusion, Second Circuit once reasoned that "When a self-regulatory association of securities firms,

FINRA and the NASD's conclusion is particularly dangerous for broker-dealers because a broker-dealer's obligation to "comply with just and equitable principles of trade" relates to the broker-dealer's duty of fair dealing to the investing public.[170] When approving FINRA Rule 12200, the SEC found that:

> FINRA's arbitration rules [are] "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . and, in general, to protect investors and the public interest."[171]

In short, the broker-dealer jeopardizes many of its binding obligations when it demands that customers waive their rights under Rule 12200. As noted above, Congress passed § 15A(b) to promote "just and equitable principles of trade."[172] But, when a broker-dealer has their customer waive Rule 12200, the broker-dealer violates its duty to comply with "just and equitable principles of trade,"[173] undermining Congressional intent and also undermining its duty of fair dealing with the investing public.[174]

Regardless, if Rule 12200 is an unwaivable regulatory right, then the customer can invoke it despite signing the Customer Agreement.[175] Furthermore, the weight of jurisprudence[176] agrees that Rule 12200 is *at least* a written arbitration agreement between the Broker-Dealer and FINRA,[177] so the next section will analyze an implication of that conclusion.

III. WAIVER VIOLATES THE BROKER-DEALER'S IMPLIED DUTY OF GOOD FAITH & FAIR DEALING TO FINRA

under direct federal supervision, ordains that its members may not require their employees to waive arbitration rights, it would be inappropriate for us to enforce such a waiver." Thomas James Assocs., Inc. v. Jameson, 102 F.3d 60, 66 (2d Cir. 1996).

[170] SEC. & EXCH. COMM'N, *Guide to Broker-Dealer Registration*, SEC.GOV (2008), https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html.

[171] Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 1., Relating to the Adoption of NASD Rules 4000 Through 1000 Series and the 12000 through 14000 Series as FINRA Rules in the New Consolidated FINRA Rulebook, 73 F.R. 57174 (Sep. 25, 2008).

[172] 15 U.S.C. § 78o–3(b)(7).

[173] FINRA, *Regulatory Notice 16-25: Forum Selection Provisions* (July 2016).

[174] SEC. & EXCH. COMM'N, *supra* note 170.

[175] FINRA, Regulatory Notice 16-25: Forum Selection Provisions (July 2016). ("the mandatory nature of the FINRA rules' requirement that FINRA arbitration must be available upon the customer's request, even in the absence of an agreement to arbitrate.").

[176] In *Goldman Sachs & Co v. Golden Empire Schools Financing Authority*, no party disputed whether FINRA Rule 12200 was a written agreement to arbitrate, so the court presumed it was a written agreement to arbitrate. 764 F.3d 210, 213 (2d Cir. 2014). Other Courts have affirmatively held that Rule 12200 is a written agreement to arbitrate. *See* Waterford Inv. Serv., Inc. v. Bosco, 682 F.3d 348, 353 (4th Cir. 2012); *see also* Washington Square Sec., Inc. v. Aune, 385 F.3d 432, 435 (4th Cir. 2004) (where the National Association of Securities Dealers' Rules constituted a written agreement to arbitrate); *see also* UBS Financial Serv., Inc. v. West Virginia University Hosp., Inc., 660 F.3d 643, 649 (2d Cir. 2011); *see also Golden Empire Schools Fin. Auth*., 764 F.3d at 213 (assuming that FINRA Rule 12200 is a written agreement to arbitrate).

[177] The customer is a third-party beneficiary to FINRA Rule 12200. Goldman, Sachs & Co. v. City of Reno, 747 F.3d 733, 749 (9th Cir. 2014) (Battaglia, concurring in part); Kiddler, Peabody & Co. v. Zinsmeyer Tr, P'ship, 41 F.3d 861, 864 (2d Cir. 1994); J.P. Morgan Securities, LLC v. Louisiana Citizens Property Ins., Corp., 712 F. Supp. 2d 70 (S.D.N.Y. 2010); Hunsinger v. Carr, No. 14-2302, 2016 WL 2996782 (E.D. Penn. May 24, 2016).

Even though Courts generally agree that Rule 12200 is a written agreement to arbitrate,[178] no Court has considered FINRA's reasonable expectations of that agreement when assessing whether a broker-dealer may bargain to waive it.[179]

The implied duty of good faith prevents the broker-dealer from evading Rule 12200.[180] "Every contract imposes upon the parties a duty of good faith and fair dealing in its performance and enforcement."[181] This includes a duty "not to act as to [interfere with] the reasonable expectations of the other party regarding the fruits of the contract."[182] Generally, what contracts promise defines what constitutes interference with those reasonable expectations.[183] Notably, every broker-dealer operating in the United States must promise to uphold Rule 12200 at least twice before signing any Customer Agreement.

First, Rule 12200 is itself a written promise which gives FINRA reason to expect the broker-dealer to maintain the customer's arbitration right.[184] Rule 12200 expressly promises the customer a right to invoke arbitration—a right that good faith demands the broker-dealer leave alone.[185] The right to arbitrate is a longstanding right which the securities industry has recognized for over a century.[186] FINRA even issued a regulatory notice to warn member-firms that it expects them to maintain the customer's right, asserting that "FINRA rules do not permit member firms to require associated persons to waive their right to arbitration under FINRA's rules in a predispute agreement."[187]

Second, each broker-dealer, in its FINRA-membership application, must promise the SEC—with FINRA's knowledge—that it will uphold FINRA Rule 12200.[188] As part of the application, FINRA requires each person associated with the applicant-broker-dealer to sign and submit a Form U–4 (a contract)[189] to the SEC.[190] In such form, each associated person[191] promises:

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[178] *See, e.g.*, Goldman Sachs & Co. v. City of Reno, 747 F.3d 733, 747 (9th Cir. 2014).
[179] *See id.* at 743; *see also Golden Empire Schools*, 764 F.3d at 217. To consider FINRA's interests a federal court may have to enjoin FINRA. FED. R. CIV. P. 19(a)(1)(B)(i).
[180] Alabama v. North Carolina, 560 U.S. 330, 351 (2010) (establishing relevancy to this discussion insofar as the nation's highest court recently mentioned that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.").
[181] *Id.*
[182] Metcalf Constr. Co. v. United States, 742 F.3d 984, 991 (Fed. Cir. 2014).
[183] *Id.*
[184] *See generally FINRA Application Process*, FINRA.org., https://www.finra.org/sites/default/files/external_apps/p129282.html (last visited Nov. 21, 2020).
[185] FINRA, RULE 12200 (2008).
[186] *See* CONSTITUTION AND BY-LAWS OF THE NEW YORK STOCK EXCHANGE 35 (1869).
[187] FINRA, *Regulatory Notice 16-25: Forum Selection Provisions* (July 2016).
[188] *See generally* FINRA, RULE 1013.
[189] *See, e.g.*, Thomas James Associates, Inc. v. Jameson, 102 F.3d 60, 62 (2d Cir. 1996).
[190] *Id.*
[191] The term "Associated Person" is extremely broad. It "means (1) a natural person registered under FINRA rules; or (2) a sole proprietor, or any partner, officer, director, branch manager of the Applicant, or any person occupying a similar status or performing similar functions; (3) any company, government or political subdivision or agency or instrumentality of a government controlled by or controlling the Applicant; (4) any employee of the Applicant, except any person whose functions are solely clerical or ministerial; (5) any person directly or indirectly controlling the Applicant whether or not such person is registered or exempt from registration under the FINRA By-Laws or FINRA rules; (6) any person engaged in investment banking or securities business controlled directly or indirectly by the Applicant whether such person is registered or exempt from registration under the FINRA By-Laws or FINRA rules; or (7) any person who will be or is anticipated to be a person described in (1) through (6) above." FINRA, RULE 1011 (2008).

> [To] submit to the authority of the jurisdictions and SROs and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and SROs as they are or may be adopted, or amended from time to time.[192]

In other words, FINRA requires each person associated with the broker-dealer to independently promise the SEC that the person will comply with all FINRA rules—including Rule 12200.[193] Ergo, each associated person also promises to uphold FINRA Rule 2010.[194] This rule requires "[Each] member, in the conduct of its business, [to] observe high standards of commercial honor and just and equitable principles of trade."[195] Both FINRA and common sense suggest that a commercially honorable firm would not attempt to sidestep a FINRA rule that the firm's members promised to obey.[196] One should also note that every brokerage firm, (rather than the firm's associated persons), also files a Form BD with the SEC when registering with FINRA.[197] In Form BD, the brokerage firm has to disclose whether an SRO ever found the firm to have violated an SRO-rule.[198] Presumably, the SEC and FINRA want this information to guarantee that, if registered, the firm will not violate other SRO-rules in the future.[199] Admittedly, FINRA monitors its members to enforce their compliance with rules—which is a sign that FINRA does not expect *every* single firm to comply with them—but FINRA can nevertheless reasonably expect individual member-firms, along with their associated individuals, to uphold their U–4 promises and BD guarantee.[200]

Given that every FINRA-member broker-dealer, through its own promises, leads FINRA to reasonably expect that the broker-dealer will maintain Rule 12200, the duty of good faith and fair dealing prohibits any FINRA-member brokerage firm from interfering with that expectation by bargaining for waiver.[201] In fact, in the cases before the Circuit Courts, even the customers had no notice that they had potentially waived Rule 12200.[202]

IV. THE CIRCUIT CASES' FORUM-SELECTION CLAUSES ARE TOO VAGUE TO WAIVE RULE 12200

A party signing a waiver must know which rights they are waiving because waiver is a voluntary act.[203] However, the forum-selection clause's phrase "all actions and proceedings" is too ambiguous to alert a

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[192] FINRA, FORM U-4, *supra* note 78 (emphasis added).
[193] *See generally* FINRA, RULE 1013 (2020).
[194] *See* FINRA, FORM U-4, *supra* note 78
[195] FINRA, RULE 2010 (2008).
[196] FINRA, *Regulatory Notice 16-25: Forum Selection Provisions* (July 2016).
[197] SEC, UNIFORM APPLICATION FOR BROKER-DEALER REGISTRATION (FORM BD).
[198] *Id.*
[199] *See id.*
[200] "FINRA monitors the activities of FINRA firms . . . for compliance with FINRA's rules . . . . FINRA conducts more than one thousand on-site firm and branch office examinations each year." "If apparent violations of rules and regulations are discovered FINRA may initiate a disciplinary action." FINRA, *Interacting With FINRA*, https://www.finra.org/registration-exams-ce/manage-your-career/interacting-finra (last visited Nov. 21, 2020). For violations of the Member Agreement, FINRA fines the firm between $2,000 and $77,000, and may suspend or expel the firm from FINRA. FINRA, SANCTIONS GUIDELINES 44 (2020), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf.
[201] Metcalf Construction Co. v. U.S., 742 F.3d 984, 991 (Fed. Cir. 2014).
[202] *See, e.g.*, Reading Health Sys. v. Bear Sterns & Co., 900 F.3d 87, 103 (3d Cir. 2018).
[203] *Reading Health Sys.*, 900 F.3d at 103. Even the 9th Circuit has accepted this principle. Royal Air Properties, Inc. v. Smith, 333 F.2d 568, 571 (9th Cir. 1968); Lawson v. Klondex Mines Ltd., 450 F. Supp. 3d 1057, 1080 (D. Nev. 2020). The Second Circuit accepts it too, but in *Golden Empire* held that the forum-selection clause does not have to mention arbitration to alert the customer that they were waiving arbitration. Goldman Sachs & Co v. Golden Empire Schools Financing Authority, 764 F.3d 210, 215 (2d Cir. 2014)

reasonable customer that they are waiving their Rule 12000 arbitration right.[204] Specifically, (1) the term "action" only includes litigation[205] and (2) the term "proceeding" is ambiguous.[206]

First, the term "action" only includes litigation and not arbitration. Black's Law Dictionary defines an "action" as, "A civil or criminal judicial proceeding."[207] According to this definition, an action does not include FINRA arbitration.[208] Ballentine's Law Dictionary's agrees, defining an "action" as, "A judicial proceeding, either in law or in equity, to obtain relief at the hands of a court."[209] The Cornell Legal Information Institute (LII) also agrees, defining an "action" as "primarily [a reference] to the act of bringing a lawsuit, prosecution, or judicial proceeding."[210] These legal dictionaries unanimously confirm that the term "action" cannot alert a reasonable customer that they are waiving FINRA arbitration.

Second, the term "proceeding" has an ambiguous scope.[211] For example, Black's Law Dictionary contains two conflicting definitions of "proceeding."[212] On one hand, it defines a "proceeding" as, "The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and entry of judgment."[213] This definition equates a proceeding with the business of litigation.[214] On the other hand, Black's also defines a "proceeding" as "Any procedural means for seeking redress from a tribunal or agency."[215] This definition suggests that a "proceeding" includes an arbitral tribunal.[216] Likewise, LII also contains conflicting definitions of "proceeding." On one hand, it defines "proceeding" as, "A procedure through which one seeks redress from a court or agency."[217] This definition includes litigation.[218] On the other hand, LII defines "proceeding" as, "A filing, hearing, or other step that is part of a larger action."[219] Contrarily, this definition includes arbitral tribunals, which accept filings and conduct hearings.[220] Notably, Ballentine's Law Dictionary asserts that arbitration is not a "proceeding": "[Proceeding includes] all methods of invoking the action of courts and applicable generally to any step taken by a suitor to obtain the interposition or action of a court."[221] But, because one cannot confirm whether a "proceeding" includes arbitration without cherry-picking Ballentine's definition (which denies

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[204] *See, e.g.*, *Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[205] *See, e.g.*, *id.*
[206] Compare *Proceeding*, BLACK'S LAW DICTIONARY (10th ed. 2014) to *Proceeding*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010).
[207] *See Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[208] *Id.*
[209] *Action*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010) (emphasis added).
[210] *Legal Action*, Legal Information Institute, https://www.law.cornell.edu/wex/legal_action (last visited Nov. 21, 2020).
[211] *See Proceeding*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[212] *Id.*
[213] *Id.*
[214] *Id.* The commentary to the definition reads "'Proceeding' is a word much used to express the business done in courts." *Id.*
[215] *Id.*
[216] *Id.*
[217] *Proceeding*, Legal Information Institute, https://www.law.cornell.edu/wex/proceeding (last visited Nov. 21, 2020).
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Proceeding*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010). This definition cited Bowers v. New York & Albany Lighterage Co., 273 U.S. 346 (1927) (holding that "It is clear that the meaning of 'proceeding' as used in the clause of limitation in section 250(d), Revenue Act of 1921, cannot be restricted to steps taken in a suit; it includes as well steps taken for the collection of taxes by distraint.").

that an arbitration is a proceeding) the term "proceeding" is insufficient to alert the customer about whether they are waiving Rule 12200 arbitration.[222]

In short, a reasonable customer (who is prudently using a contemporary legal dictionary) would likely have believed, when signing the Customer Agreement, that they did not waive their Rule 12200 right.[223] Therefore, such a waiver is invalid.[224]

CONCLUSION

Although broker-dealers have only sought to waive large, institutional customers' Rule 12200 arbitration rights; a broker-dealer cannot force any customer to waive Rule 12200 arbitration for three broad reasons, the first which no Circuit has considered in detail, and the third which no Circuit has considered at all.

First, § 29(a), as Dodd-Frank amended in 2010, likely voids any contractual waiver of Rule 12200.[225] The statute voids any waiver via a facial reading, for which both the SEC[226] and the *McMahon* Court[227] indicate support. Moreover, an examination of Dodd Frank's legislative history confirms that, like *McMahon*,[228] Dodd-Frank sought to enforce broker-dealers' Exchange-Act duties.[229] Dodd-Frank sought to enforce those duties, in part, by "provid[ing] equal treatment for the rules of all SROs under [§] 29(a)."[230] In so doing, Congress sought to protect investors of all sizes,[231] while both Congress[232] and the Executive[233] expressed concerns about broker-dealers—rather than customers—enjoying their choice of forum.

Second, FINRA holds that Rule 12200 is unwaivable, and courts of law may owe FINRA's opinion some deference.[234] Regardless, Rule 12200 underwent a number of official channels before FINRA enacted

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[222] *See Proceeding*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[223] *See generally* UBS Fin. Serv., Inc. v. Carilion Clinic, 706 F.3d 319 (4th Cir. 2013).
[224] *See* Reading Health Sys. v. Bear Sterns & Co., 900 F.3d 87, 103 (3d Cir. 2018); *see also* Royal Air Prop., Inc. v. Smith, 333 F.2d 568, 571 (9th Cir. 1968).
[225] *See supra* Section 1(C) for a discussion on how Dodd-Frank affects one's reading of the rule.
[226] *See, e.g.*, SEC. & EXCH. COMM'N, STUDY ON INVESTMENT ADVISORS AND BROKER-DEALERS 50 (Jan. 2011).
[227] *See, e.g.*, Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 231 (1987).
[228] *Id.* at 228.
[229] *See* S. REP. NO. 111-176, at 244 (2010) (stating vaguely that Title IX, Subtitle B, of which § 29(a) is a part, "relates to enforcement issues.").
[230] *Id. See, e.g., Regulatory Restructuring and Reform of the Financial System: Hearing Before the Committee on Financial Services*, 110th Cong. (2008) (statement of Joseph E. Stiglitz, Professor, Colombia University) (saying "The rules need to be . . . simple . . . and transparent [enough], so that everybody, including Congress, can see on an ongoing basis whether there is enforcement."). *See also, e.g., Committee on Senate Financial Crisis Inquiry Commission*, 111th Cong. (2010) (statement of Denise Voigt Crawford, President, North American Security Administrators Association) (declaring that "Deregulation is no longer the presumptive policy prescription; indeed today, the sense is that the current crisis was deepened by excessive deregulation.").
[231] *See* 156 Cong. Rec. H5233-01 (2010) (wherein Congresspeople mentioned Madoff nine times); *see also* S. REP. NO. 111-176 (wherein Congresspeople mentioned Madoff forty-eight times).
[232] *See, e.g.*, 156 Cong. Rec. H5233-01 (2010) (arguing that "[S]ecurities industry practices have deprived investors of a choice when seeking dispute settlement, too. In particular, pre-dispute mandatory arbitration clauses inserted into contracts have limited the ability of defrauded investors to seek redress." – Rep. Barney Frank (D-MA)).
[233] *See, e.g.*, SEC. & EXCH. COMM'N, STUDY ON INVESTMENT ADVISORS AND BROKER-DEALERS 51 (Jan. 2011).
[234] *See, e.g.*, Charles Schwab & Co. v. FINRA, 861 F. Supp. 2d 1063 (N.D. Cal. 2012).

it,[235] and Congress indicated that any waiver of SRO-rules would frustrate the Exchange-Act's regulatory scheme.[236]

Third, the implied duty of good faith applies to all contracts, and all FINRA broker-dealers have promised twice—once through FINRA Rule 12200, and again to the SEC (with FINRA's knowledge) in its FINRA membership-application—that they will uphold the customer's Rule 12200 arbitration right.[237] The broker-dealers necessarily made these promises prior to signing any Customer Agreement.[238] In other words, every FINRA-member broker-dealer led FINRA to reasonably expect that they would not evade their Rule 12200 obligations.[239]

Finally, even if Rule 12200 were waivable, the cases before the Circuit Courts do not waive it. When consulting multiple objective legal dictionaries, one cannot determine whether the forum-selection clause's phrase "all actions and proceedings" includes FINRA arbitration.[240] Therefore, the phrase cannot alert a reasonable customer that the phrase waives Rule 12200 arbitration.[241]

Going forward, it is unclear if, when, and how Courts will resolve the Rule 12200-waiver Circuit split concerning Rule 12200 in the face of a competing forum-selection clause. The Supreme Court has given no indication that it will resolve it.[242] The Supreme Court's only relevant action was their denial of the City of Reno's Petition for a Writ of Certiorari from the Ninth Circuit.[243] Given that this issue does not involve substantial numbers of investors, and only a few Circuits have weighed-in,[244] the Supreme Court may have other priorities for now.[245] Regardless, the Circuit split needs resolution to provide lower courts, (large) investors, broker-dealers, regulators, and legislators with clear, workable standards.[246]

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[235] FINRA, *FINRA Rulemaking Process*, https://www.finra.org/rules-guidance/rulemaking-process (last visited Nov. 21, 2020).
[236] S. Rep. No. 94-75, at 24 (1975).
[237] *See* FINRA, RULE 12200 (2008). *See also* FINRA, FORM U-4, *supra* note 78, SECTION 15A (2009).
[238] *See* FINRA, RULE 1013; *see generally*, *FINRA Application Process*, *supra* note 184.
[239] *See* FINRA, RULE 12200 (2008); *see also* FINRA, FORM U-4, *supra* note 78 , SECTION 15A (2009).
[240] Compare *Proceeding*, BLACK'S LAW DICTIONARY (10th ed. 2014) to *Proceeding*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010).
[241] *Id*.
[242] The issue is absent from websites which follow the Supreme Court. *See* Calendar of Events, Supreme Court of the United States Blog, http://www.scotusblog.com/events/ (last visited Dec. 9, 2020).
[243] *See* Petition for a Writ of Certiorari, City of Reno v. Goldman, Sachs & Co., 574 U.S. 991 (U.S. 2014) (No. 14-176), 2014 WL 3919597. City of Reno, Nevada v. Goldman, Sachs & Co., 574 U.S. 991 (U.S. 2014) (No. 14-146) (denying certiorari with no explanation).
[244] Recently, in a Seventh Circuit case, *INTL FCStone Financial Inc. v. Jacobson*, the District Court below did not decide whether Rule 12200 superseded the forum-selection clause, and the Seventh Circuit refused to answer the threshold question for the first time on appeal. INTL FCStone Financial Inc. v. Jacobson, 950 F.3d 491, 503 (2020).
[245] "The Court receives approximately 7,000-8,000 petitions for a writ of certiorari each Term. The Court grants and hears oral argument in about 80 cases." SUPREME COURT OF THE UNITED STATES, *About the Court*, https://www.supremecourt.gov/about/faq_general.aspx (last visited Dec. 9, 2020).
[246] *See, e.g.*, *Regulatory Restructuring and Reform of the Financial System: Hearing Before the Committee on Financial Services*, 110th Cong. (2008) (statement of Joseph E. Stiglitz, Professor, Colombia University) (saying "The rules need to be . . . simple . . . and transparent [enough], so that everybody, including Congress, can see on an ongoing basis whether there is enforcement.").

Applicant Details

First Name	**Andrew**
Middle Initial	**F**
Last Name	**Esoldi**
Citizenship Status	**U. S. Citizen**
Email Address	**andrew.esoldi@gmail.com**
Address	**Address** Street **32 Cambridge Place** City **Englewood Cliffs** State/Territory **New Jersey** Zip **07632** Country **United States**
Contact Phone Number	**2015756073**

Applicant Education

BA/BS From	**Fordham University**
Date of BA/BS	**May 2016**
JD/LLB From	**Pace University School of Law** **http://www.law.pace.edu**
Date of JD/LLB	**May 13, 2019**
Class Rank	**33%**
Law Review/Journal	**Yes**
Journal(s)	**Pace Intellectual Property, Sports & Entertainment Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**FINRA Securities Dispute Resolution Triathlon Team**

Bar Admission

Admission(s)	**Connecticut, District of Columbia, New Jersey, New York**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Schiripo, Patricia
patricia.schiripo@law.njoag.gov
973-648-7819
Wilson, The Honorable Robert C.
lisa-dale.jansen@njcourts.gov
Pitt, Isabella
isabella.r.pitt@gmail.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ANDREW F. ESOLDI
32 Cambridge Place, Englewood Cliffs, NJ 07632 | 201-575-6073 | andrew.esoldi@gmail.com

March 2, 2022

The Honorable Lewis J. Liman
United States District Judge
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: Law Clerk Position

Dear Judge Liman:

I am writing to express my strong interest in a law clerk position in your chambers for the 2024-2025 term listed on the OSCAR website. I am currently a Special Service Attorney in the Consumer Fraud Prosecution Section in the Division of Law within the New Jersey Office of the Attorney General. I graduated from the Elisabeth Haub School of Law at Pace University *cum laude* in 2019 and I graduated from Fordham University in 2016. Having grown up and attended school in and around New York City, I would welcome the opportunity to learn from your experience not only as a judge, but also as a former federal prosecutor, a career I plan to pursue.

As an attorney with the Division of Law, I have had the opportunity to work on a broad range of consumer fraud investigations and litigations on behalf of the New Jersey Division of Consumer Affairs. As consumer fraud appears in many industries, my work requires that I develop expertise across different subject matters – from home improvement contractors, financial corporations, and for-profit schools to other businesses providing goods and services to consumers statewide. Working for the Division of Law, I have had many opportunities to refine my writing and drafting skills. I have drafted briefs in opposition to a motion to dismiss and a motion to vacate a default judgment, and I have drafted discovery requests, interrogatories, and responses during litigation. This experience, along with the experiences I gained as a judicial intern and as a legal intern in the private and public sector, has trained me to research, think, and write clearly about various complex and nuanced legal questions. I have gained experience working at all stages of consumer fraud matters – from the beginning of an investigation through litigation and settlement. My work has required me to participate in the drafting of complaints, motion practice, paper discovery, depositions, trial preparation, and settlement. Of the matters I am currently assigned to, one involves a multistate investigation of a major loan company. In an investigation such as this, I work with the investigators from the Office of Consumer Protection and our counterparts from other states to strategize investigative techniques, including consumer interviews and gaining assistance from federal agencies, to assess allegations of unconscionable lending, advertising, collection practices, and insurance fraud. Matters such as this have provided me with a solid foundation in communication skills, project management, teamwork, and the ability to work under short deadlines. I have found the experience of advocating for New Jersey consumers to be deeply rewarding and incredibly impactful.

Enclosed please find my résumé, law school transcript, undergraduate transcript, writing sample, and three letters of recommendation from my Section Chief Patricia Schiripo, Deputy Attorney General Isabella Pitt, and the Honorable Robert C. Wilson, J.S.C. I would welcome the opportunity to meet with you to discuss my qualifications and a clerkship further. Thank you for considering my application.

Respectfully,

Andrew F. Esoldi, Esq.

ANDREW F. ESOLDI

32 Cambridge Place, Englewood Cliffs, NJ 07632 | 201-575-6073 | andrew.esoldi@gmail.com

LEGAL & GOVERNMENT EXPERIENCE

New Jersey Office of the Attorney General, Newark, NJ
Attorney – Special Services (Consumer Fraud Prosecution Section) February 2020 – Present

Represent and counsel the New Jersey Division of Consumer Affairs in its consumer fraud investigations involving home improvement contractors, consumer finance companies, for-profit schools, and other businesses providing goods and services to consumers statewide. Strategize and conduct large-scale investigations of identified violations of the Consumer Fraud Act, including financial fraud in a multi-state action against a major loan company, requiring dozens of consumer interviews to identify unconscionable lending, advertising, and collection practices. Drafted brief in opposition to motion to dismiss, procured experts, drafted discovery requests, interrogatories, and responses during litigation with national merchant cash advance corporation. Regularly draft civil investigatory demands, subpoenas and requests for statements under oath. Manage document review and production with opposing counsel and assist with deposition preparation and execution. Draft motions for default judgment, conduct legal research, and draft legal memoranda on consumer protection statutes, including Covid-19 price gouging.

Superior Court of New Jersey, Hackensack, NJ
Judicial Intern to the Honorable Robert C. Wilson, J.S.C. January – February 2020

Researched case law on complex business litigation matters. Prepared for and attended oral arguments, case management conferences, and mediated small claims matters. Assisted in the drafting and editing of the Judge's opinions.

Pace Investor Rights Clinic, John Jay Legal Services, White Plains, NY
Student Attorney August 2018 – May 2019

Handled securities arbitrations before FINRA Dispute Resolution on behalf of small investors. Interviewed and counseled clients, investigated claims, conducted legal research, drafted legal memoranda, and negotiated settlements.

King's County District Attorney's Office, Brooklyn, NY
Legal Intern (Orange Trial Zone) June – August 2018

LG Electronics U.S.A., Inc., Englewood Cliffs, NJ
Legal Intern January – May 2018

Darian Law Office, White Plains, NY
Legal Intern September – December 2017

New Jersey Office of the Attorney General, Newark, NJ
Legal Intern (Cybersecurity/Internet Privacy Section) May – August 2017

Passaic County Prosecutor's Office, Paterson, NJ
Legal Intern (Domestic Violence & Narcotics Units) May – August 2017

Law Offices of Domenica Bizzoco, Esq., New York, NY
Legal Assistant January 2015 – August 2016

Office of U.S. Congressman Bill Pascrell, Paterson, NJ
Intern June – August 2014

Office of U.S. Senator Robert Menendez, Newark, NJ
Intern May – July 2014

EDUCATION

Elisabeth Haub School of Law at Pace University, White Plains, NY
Juris Doctor, *cum laude,* May 2019
Honors: President's Scholarship Award (*renewed 2017-2018, 2018-2019*); Jay Carlisle Scholarship Award; Dean's List
Activities: FINRA Securities Dispute Resolution Triathlon Team; Intellectual Property/Sports Law Journal, *Junior Associate*; Pace Law Advocacy Program, *General Board Member*; Criminal Justice Society, *Treasurer*; Italian-American Law Organization, *Rep.*; Int'l Criminal Moot Court Competition, *Planning Committee*

Fordham University, New York, NY
Bachelor of Arts in International Political Economy, May 2016

BAR ADMISSIONS

New Jersey, New York, Connecticut, District of Columbia, U.S. District Court for the District of New Jersey

COMMUNITY SERVICE

Dorothy Day Center for Service & Justice at Fordham University, New York, NY
Volunteer Tutor (City Squash Program & Mentor for Strive for College Program) September 2013 – May 2016

Global Outreach at Fordham University, Alamosa, CO
Service Immersion Volunteer May 2015

Other Skills: Proficient in written and spoken Italian; Cycling; Photography; 2nd Degree Black Belt – Tae Kwon Do

PACE UNIVERSITY

ELISABETH HAUB SCHOOL OF LAW

Record of: Andrew Francis Esoldi
32 Cambridge Pl
Englewood Cliffs, NJ 076322041
United States of America

Issued To:

Date Issued: 11-JUN-2019
Social Security: *****6238
Student ID: U00856530
Level: Law-JD
Campus: White Plains

Course Level: Law-JD
Only Admit: Fall 2016

Current Program
College : School of Law - Part Time
Major : Law

Comments:
Skills requirement satisfied: Ext Crim Def/ Pros
Writing requirement satisfied: Adv. Criminal Law
Cybercrime/Cybersecurity

Degree Awarded: Doctor of Jurisprudence 13-MAY-2019
Major : Law
Inst. Honors: Cum Laude

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2016						
LAW	610A	Civil Procedure	5.00	B-	13.35	
LAW	621	Criminal Law	3.00	B-	8.01	
LAW	622C	Legal Skills I	3.00	B+	9.99	
LAW	631	Torts	4.00	A	16.00	
		Ehrs: 15.00 GPA-Hrs: 15.00 QPts:	47.35	GPA:	3.16	
Spring 2017						
LAW	601	Contracts	4.00	C+	9.32	
LAW	622D	Legal Skills II	2.00	A-	7.34	
LAW	634	Property	5.00	B-	13.35	
LAW	646	Constitutional Law	4.00	B+	13.32	
		Ehrs: 15.00 GPA-Hrs: 15.00 QPts:	43.33	GPA:	2.89	
Summer 1 2017						
LAW	710A	Extship-Crim. Def./Prosecution	6.00	A	24.00	
		Ehrs: 6.00 GPA-Hrs: 6.00 QPts:	24.00	GPA:	4.00	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Fall 2017						
LAW	625	Prof Responsibility	3.00	B	9.00	
LAW	649	Evidence	4.00	B	12.00	
LAW	675	Crim. Pro-Investigation	4.00	B+	13.32	
LAW	738	Int'l Business Transactions	3.00	B-	8.01	
		Ehrs: 14.00 GPA-Hrs: 14.00 QPts:	42.33	GPA:	3.02	
Spring 2018						
LAW	657	Securities Regulation	3.00	B	9.00	
LAW	684	Trial Advocacy	4.00	A	16.00	
LAW	745	Corps & P-Ships	4.00	B	12.00	
LAW	900	Extship-Int'l Trade	4.00	A	16.00	
		Ehrs: 15.00 GPA-Hrs: 15.00 QPts:	53.00	GPA:	3.53	
Fall 2018						
LAW	606B	Adv.Issues Crim.Law-Cybercrime	2.00	B	6.00	
LAW	701	Wills & Trusts	4.00	B-	10.68	
LAW	826A	Clinic-Investor Rights	3.00	A-	11.01	
LAW	826B	Clinic-Investor Rights Sem.	2.00	A	8.00	
LAW	919	Lawyering	4.00	A-	14.68	
		Ehrs: 15.00 GPA-Hrs: 15.00 QPts:	50.37	GPA:	3.36	
Spring 2019						
LAW	826A	Clinic-Investor Rights	2.00	A-	7.34	
LAW	826B	Clinic-Investor Rights Sem.	1.00	A	4.00	
LAW	861A	Adv.Analytical Skills	2.00	B+	6.66	
LAW	861D	MBE Strategies (Distance)	3.00	B	9.00	
		Ehrs: 8.00 GPA-Hrs: 8.00 QPts:	27.00	GPA:	3.38	

********** CONTINUED ON PAGE 2 **********

NOTE: Pace Law has a mandatory curve for all 1st year courses except for Legal Skills. The mean GPA for each course must fall between 2.5 & 2.95, where a B equates to a 3.00 and a B- equates to 2.67. A maximum of 7% of students in a class may receive a letter grade of A. Typically, only 5% of students receive an A in these courses

PACE
UNIVERSITY
ELISABETH HAUB
SCHOOL OF LAW

Record of: Andrew Francis Esoldi

Date Issued: 11-JUN-2019
Social Security: *****6238
Student ID: U00856530
Level: Law-JD
Campus: White Plains

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	88.00	88.00	287.38	3.27
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	88.00	88.00	287.38	3.27

********** END OF TRANSCRIPT **********

UNOFFICIAL

NOTE: Pace Law has a mandatory curve for all 1st year courses except for Legal Skills. The mean GPA for each course must fall between 2.5 & 2.95, where a B equates to a 3.00 and a B- equates to 2.67. A maximum of 7% of students in a class may receive a letter grade of A. Typically, only 5% of students receive an A in these courses

FORDHAM UNIVERSITY

THE JESUIT UNIVERSITY OF NEW YORK

Lincoln Center Campus
113 West 60th Street
New York, NY 10023
718-817-1000

Rose Hill Campus
441 East Fordham Road
Bronx, NY 10458
718-817-1000

Westchester Campus
400 Westchester Avenue
West Harrison, NY 10604
718-817-1000

Name: Andrew Francis Esoldi

Student ID: A10621079 DOB: 16-JUL SSN: *** - ** - 6238

Previous Institution(s):

COURSE #	COURSE TITLE	CRED	GRD	PTS
Course Level: Undergraduate				
High School: DON BOSCO PREPARATORY HS 03-JUN-2012				
Current Program				
Bachelor of Arts				
College : Fordham College/Rose Hill				
Major : Intl Political Economy				
Minor : Business Administration				
Italian				
Comments:				
GRAD RANK 342 / 767				
GRAD RANK 342 / 767				
Degree Awarded Bachelor of Arts 21-MAY-2016				
Primary Degree				
College : Fordham College/Rose Hill				
Major : Intl Political Economy				
Minor : Business Administration				
Italian				
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:				
Fall 2012	ADVANCED PLACEMENT			
TRNF 9999	US HISTORY	3.000	TR	
TRNF 9999	ENGLISH LIT AND COMP	3.000	TR	
Ehrs:	6.000 QPts:	0.000		
GPA-Hrs:	0.000 GPA:	0.000		
INSTITUTION CREDIT:				
Fall 2012				
Fordham College/Rose Hill				
Undeclared (Political Science)				
CISC 1100	STRUCTURES OF COMP SCI	3.000	B+	9.990
HIST 1100	UNDRSTND HIST CHNGE: AMER HIST	3.000	B+	9.990
ITAL 1501	INTERMEDIATE ITALIAN I	3.000	A	12.000
POSC 1100	INTRO TO POLITICS	3.000	A-	11.010
SYMP 0003	PRE-LAW SYMPOSIUM	1.000	P	.000
THEO 1000	FAITH & CRITICAL REASON	3.000	B-	8.010
ZZRU ADVI	FRESHMAN ADVISING	0.000	S	.000
Ehrs:		16.000	QPts:	51.000
GPA-Hrs:		15.000	GPA:	3.400
Spring 2013				
CLASS RANK IS 264 / 907				
Fordham College/Rose Hill				
Undeclared (Political Science)				
ECON 1200	BASIC MICROECONOMICS	3.000	A	12.000
ENGL 1102	COMPOSITION II	3.000	B+	9.990
ITAL 1502	INTERMEDIATE ITALIAN II	3.000	A-	11.010
PHIL 1000	PHIL OF HUMAN NATURE	3.000	B	9.000
PHYS 1201	INTRO ASTRONOMY	3.000	A-	11.010
ZZRU ADVI	FRESHMAN ADVISING	0.000	S	.000
********** CONTINUED ON NEXT COLUMN **********				

COURSE #	COURSE TITLE	CRED	GRD	PTS
Ehrs:		15.000	QPts:	53.010
GPA-Hrs:		15.000	GPA:	3.534
Summer 2013				
Fordham College/Rose Hill				
Undeclared (Political Science)				
ITAL 2001	ITALIAN LANGUAGE & LITERATURE	3.000	A-	11.010
Ehrs:		3.000	QPts:	11.010
GPA-Hrs:		3.000	GPA:	3.670
Fall 2013				
Fordham College/Rose Hill				
Undeclared (Political Science)				
BISC 1010	FOUNDATIONS OF BIOLOGY	3.000	B+	9.990
ECON 1100	BASIC MACROECONOMICS	3.000	C+	6.990
ENGL 2000	TEXTS & CONTEXTS	3.000	B-	8.010
POSC 2002	WEST WING ILC	1.000	P	.000
THEA 1100	INVITATION TO THEATRE	3.000	B	9.000
THEO 3200	INTRO TO NEW TESTAMENT	3.000	B+	9.990
ZZRU ADV2	SOPHOMORE ADVISING	0.000	S	.000
Ehrs:		16.000	QPts:	43.980
GPA-Hrs:		15.000	GPA:	2.932
Spring 2014				
CLASS RANK IS 408 / 847				
Fordham College/Rose Hill				
Intl Political Economy				
ANTH 3351	COMPARATIVE CULTURES	4.000	A-	14.680
HIST 3950	LATINO HISTORY	4.000	B	12.000
ITAL 2605	ITALIAN CONV & COMP	4.000	A-	14.680
PHIL 3000	PHILOSOPHICAL ETHICS	3.000	A	12.000
POSC 2002	WEST WING ILC	1.000	P	.000
POSC 2501	INTRO INT'L POLITICS	4.000	A	16.000
Ehrs:		20.000	QPts:	69.360
GPA-Hrs:		19.000	GPA:	3.651
Fall 2014				
Fordham College/Rose Hill				
Intl Political Economy				
BLBU 2234	LEGAL FRAMEWORK BUSINESS	3.000	A	12.000
ECON 2140	STATISTICS I	4.000	A-	14.680
ECON 3244	INT'L ECONOMIC POLICY	4.000	B+	13.320
POSC 3915	INTERNATIONAL POL ECON	4.000	A	16.000
Ehrs:		15.000	QPts:	56.000
GPA-Hrs:		15.000	GPA:	3.733
Spring 2015				
CLASS RANK IS 94 / 724				
Fordham College/Rose Hill				
Intl Political Economy				
BLBU 3436	COMMERCIAL TRANSACTIONS	3.000	A	12.000
ECON 2142	STATS DECISION MAKING	4.000	A	16.000
ITAL 3030	CRIMINAL TALES	4.000	A-	14.680
********** CONTINUED ON PAGE 2 **********				

Andrew Esoldi
32 Cambridge Pl
Englewood Cliffs, NJ 07632

Anna Ponterosso
University Registrar
Director of Academic Records

Not considered official without Seal or Registrar's Signature
Course instruction at Fordham University is conducted in English with the exception of foreign language courses.

Date Issued: 21-JUL-2021 Page: 1

FORDHAM UNIVERSITY

THE JESUIT UNIVERSITY OF NEW YORK

Lincoln Center Campus
113 West 60th Street
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441 East Fordham Road
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718-817-1000

Westchester Campus
400 Westchester Avenue
West Harrison, NY 10604
718-817-1000

Name: Andrew Francis Esoldi

Student ID: A10621079 DOB: 16-JUL SSN: *** - ** - 6238

Previous Institution(s):

COURSE #	COURSE TITLE	CRED	GRD	PTS
MKBU 3225	MARKETING PRINCIPLES	3.000	A	12.000
	Ehrs:	14.000	QPts:	54.680
	GPA-Hrs:	14.000	GPA:	3.906
Dean's List				
Fall 2015				
Fordham College/Rose Hill				
Intl Political Economy				
ACBU 2222	PRNPL OF FINANCIAL ACCTG	3.000	B+	9.990
ITAL 2561	READING CULTURE THROUGH LIT	4.000	C	8.000
ITAL 3550	IT UNIFICATION: FILM/LIT	4.000	A-	14.680
PSYC 4340	LAW & PSYCHOLOGY	4.000	B+	13.320
	Ehrs:	15.000	QPts:	45.990
	GPA-Hrs:	15.000	GPA:	3.066
Spring 2016				
Fordham College/Rose Hill				
Intl Political Economy				
COMM 4111	TELEVISION NEWS INNOVATORS	4.000	B+	13.320
ECON 3453	LAW AND ECONOMICS	4.000	B+	13.320
	Ehrs:	8.000	QPts:	26.640
	GPA-Hrs:	8.000	GPA:	3.330
**********	TRANSCRIPT TOTALS	**********		
INSTITUTION	Ehrs:	122.000	QPts:	411.670
	GPA-Hrs:	119.000	GPA:	3.459
TRANSFER	Ehrs:	6.000	QPts:	0.000
	GPA-Hrs:	0.000	GPA:	0.000
OVERALL	Ehrs:	128.000	QPts:	411.670
	GPA-Hrs:	119.000	GPA:	3.459
**********	END OF TRANSCRIPT	**********		

COURSE #	COURSE TITLE	CRED	GRD	PTS

Anna Ponterosso
University Registrar
Director of Academic Records

Not considered official without Seal or Registrar's Signature
Course instruction at Fordham University is conducted in English with the exception of foreign language courses.

Date Issued: 21-JUL-2021 Page:2

FORDHAM UNIVERSITY
EXPLANATION OF TRANSCRIPT

Coursework taken at Fordham University commencing with the Fall 1989 term is shown on this transcript (except MC and LT). Students with coursework completed prior to Fall 1989 have a second transcript of their academic record for the earlier period, which does not include the previous grade point average. Credits earned prior to Fall 1989 are reflected in initial statistics.

UNDERGRADUATE RECORDS:

Beginning with the Fall 1989 term, the undergraduate schools CB (Gabelli School of Business, formerly known as the College of Business Administration), CL (Fordham College at Lincoln Center), FC (Fordham College at Rose Hill), and PC (Fordham School of Professional and Continuing Studies; formerly known as LS-Fordham College of Liberal Studies, IC-Ignatius College, SG-School of General Studies) have adopted the following grading system. In July 2002, Marymount College merged with Fordham University. The undergraduate schools of Marymount College were renamed Marymount College of Fordham University (MC) (formerly known as the Women's College) and Liberal Studies at Tarrytown (LT) (formerly known as Weekend College). Coursework commencing with the Fall 2002 term is shown on this transcript. Students with coursework completed prior to Fall 2002 have a second transcript of their academic record for the earlier period. Credits earned prior to Fall 2002 are reflected in initial statistics. The schools MC and LT adopted the same grading system listed below.

Fall 2009 & after Grade	Quality Points	*Fall 1989 - Fall 2009* Quality Points	Approximate Percent *(The use of approximate percent is at the discretion of the instructor)*
A	4.00	4.0	93-100
A-	3.67	3.7	90-92
B+	3.33	3.3	87-89
B	3.00	3.0	83-86
B-	2.67	2.7	80-82
C+	2.33	2.3	77-79
C	2.00	2.0	73-76
C-	1.67	1.7	70-72
D	1.00	1.0	60-69
F	0.00	0.0	Failure
AF	0.00	0.0	Excessive Absence Failure (PC only)
WF	0.00	0.0	Withdrawal Failure
P / F	0.00	0.0	Pass/Fail Option

GRADUATE RECORDS:

GA - *Graduate School of Arts & Sciences*

Fall 2009 & after Grade	Quality Points
A	4.00
A-	3.75
B+	3.50
B	3.00
B-	2.75
C	2.00
F	0.00 Failure
FCE / FCP	0.00 Failed Comprehensive exam/Capstone
PCE / PCP	0.00 Passed Comprehensive exam/Capstone
HPCE / HPCP	0.00 High Pass Comprehensive exam/Capstone
HDCE	0.00 High Pass with Distinction Comprehensive exam
PREP	0.00 Preparation for Comprehensive Exam
AP	0.00 Adequate progress - Ph.D. only
LP	0.00 Lack of progress - Ph.D. only
WF	0.00 Withdrawal Failure
PI / FI	0.00 Passing Incomplete/Failing Incomplete (temporary grade)

Prior to Fall 1994 Grade	Quality Points
A	4.0
B+	3.5
B	3.0
C	2.0
F	0.0 Failure

Fall 1994 - Summer 2009 Grade	Quality Points
A	4.0
A-	3.7
B+	3.5
B	3.0
B-	2.7
C	2.0
D	1.0
F	0.0 Failure

Grade	Quality Points
P	0.00 Pass
HP	0.00 High Pass*

**Fall 2018 and after*

GP - *PCS Division of Graduate Studies*

Grade	Quality Points
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
C-	1.67
D	1.00
F	0.00 Failure
AF	0.00 Excessive Absence Failure
WF	0.00 Withdrawal Failure
P / F	0.00 Pass/Fail Option

GS - *Graduate School of Social Service*
GR - *Graduate School of Religion and Religious Education*

Grade	Quality Points
A	4.00
A-	3.75
B+	3.50
B	3.00
B-	2.75
C+	2.50 (GS Only)
C	2.00
F	0.00 Failure
IW	0.00 Permanent Incomplete (GS Only)
P / F	0.00 Pass/Fail Option

GE - *Graduate School of Education*

The programs offered by the Graduate School of Education are approved by the National Council of Accreditation of Teacher Education.

Grade	Quality Points
A	4.00
A-	3.70
B+	3.50
B	3.00
B-	2.70
C+	2.50
C	2.00
F	0.00 Failure
P / F	0.00 Pass/Fail Option

GB - *Gabelli School of Business (Graduate)*

Fall 2015 & after Grade	Quality Points
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67

Grade	Quality Points
C+	2.33
C	2.00
C-	1.67
D	1.00
F	0.00 Failure
P / F	0.00 Pass/Fail Option

Fall 1990 - Summer 2015 Grade	Quality Points
A	4.00
B+	3.50
B	3.00
C	2.00
D	1.00
F	0.00 Failure

Prior to Fall 1990 Grade	Quality Points
H	4.00 Honors
HP	3.00 High Pass
P	2.00 Pass
MP	1.00 Marginal Pass
F	0.00 Failure

The grades of W (Withdrew), ABS (Absent from Final Examination, temporary grade), INC (Incomplete, temporary grade), NGR (No Grade Reported, temporary grade), S (Satisfactory), U (Unsatisfactory), IP (In Progress), AUD (Audit) may be used by ALL schools. Grades prefixed with the letter T indicate credits transferred from another institution.

The student education record disclosed on this transcript is maintained and released in accord with Public Law 93-380, Sec. 438, The Family Educational Rights and Privacy Act The policy of Fordham University pertinent to this legislation is available from the Office of Academic Records and in the Student Handbook. As of October 5, 2015, for crimes of violence, including but not limited to sexual violence, defined as crimes that meet the reporting requirements pursuant to the federal Clery Act, a notation will be placed on the transcript of students found responsible after a conduct process. It will be noted that they were "suspended after a finding of responsibility for a code of conduct violation" or "expelled after a finding of responsibility for a code of conduct violation." For a respondent who withdraws from Fordham University while conduct charges are pending and declines to complete the conduct process, a notation will be placed on the transcript that the student "withdrew with conduct charges pending." For more information, see the Policy on Transcript Notations and Appeals in the University Regulations section of the Student Handbook.

AR July 2020

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
PO Box 45029
Newark, NJ 07101

ANDREW J. BRUCK
Acting Attorney General

MICHELLE L. MILLER
Director

August 25, 2021

Re: Clerkship Candidate Andrew Esoldi

Your Honor:

I write this letter of recommendation for Andrew Esoldi, who I supervise in his position as an attorney working for the New Jersey Office of the Attorney General, Division of Law, Consumer Fraud Prosecution Section. Andrew started in that position in February 2020. In my position as Section Chief for the Consumer Fraud Prosecution Section, I have had the good fortune to work with Andrew and review his work. He has been assigned to a wide variety of matters in which he has had to research, write, review documents and make assessments of investigative steps in reaching a conclusion as to whether there has been a violation under the New Jersey Consumer Fraud Act and related regulations. I have found Andrew's work product to be precisely researched, well-reasoned and well-written.

Andrew has sharpened these skills over the last eighteen months and has become more competent and decisive in his understanding and reasoning. Further, not only is Andrew a good attorney, but he is also very hard working, eager to learn, punctual, respectful, mature and a genuinely nice person. There has not been a time that I have asked Andrew to take on a project or assistant another attorney where he has not enthusiastically responded to the opportunity. I would highly recommend Andrew for a clerkship, as his work ethic and sound legal judgment would, without a doubt, be an asset to the Court.

Respectfully submitted,

By: Patricia Schiripo
Patricia Schiripo

124 Halsey Street • TELEPHONE: (973) 648-7819 •

SUPERIOR COURT OF NEW JERSEY
BERGEN VICINAGE

The Honorable Robert C. Wilson
Judge of the Superior Court

Bergen County Justice Center
Hackensack, New Jersey 07601
201-221-0700 X 25599

July 21, 2021

To Whom it May Concern:

I am writing to recommend Andrew Esoldi for a Judicial Law Clerk position in your chambers. Andrew is a bright, ambitious and hard-working individual who has great potential to be an excellent law clerk. I had the opportunity to supervise Andrew as he interned in my chambers from January to February 2020. During his short time in my chambers, Andrew assumed many of the responsibilities of a full-time law clerk. He served as a mediator for some of my small claims cases. He conducted research and assisted me in drafting opinions on civil litigation matters, tort cases, and employment issues. He assisted in preparation for oral arguments, case management conferences and the motion cycles. Through the work he did, he gained a comprehensive understanding of the New Jersey judiciary.

What stood out immediately about Andrew was that he was a quick learner who was extremely proactive about obtaining assignments, learning and gaining experience. This was evident from the thoughtful questions he asked, his willingness to take on any assignment, and the good quality of his work. Andrew always completed his work in a timely manner, communicated well with my staff and asked excellent questions. In addition to being intelligent and motivated, Andrew has a personable and professional attitude that I believe will contribute greatly to his future success as a law clerk and as an attorney. I strongly recommend him as a candidate for a law clerk position in your chambers. Please feel free to reach me with any questions or for additional information at 201 221-077 ext. 25599.

Very truly yours,

Robert C. Wilson, JSC

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
124 Halsey STREET
P.O. Box 45029
Newark, NJ 07101

ANDREW J. BRUCK
Acting Attorney General

MICHELLE L. MILLER
Director

August 30, 2021

Re: Recommendation on behalf of Andrew Esoldi

Dear Judge:

I am writing to offer my enthusiastic recommendation on behalf of Andrew Esoldi, for a clerkship position in your chambers. I have had the pleasure of working closely with Andrew on several cases since he started with the New Jersey Office of the Attorney General. Over the course of the last eighteen months as I have gotten to know him, his sharp legal acumen, strong work ethic, and commitment to public service have made him an asset to our office and a privilege to work with.

After only three weeks of working together, the Covid-19 pandemic hit and thereafter, our work relationship has been entirely remote. Given Andrew's very recent hire, we were all particularly impressed with his ability to overcome the obstacle of assimilating while remote. Andrew took everything in stride and excelled. He very quickly grew into an integral part of the Consumer Fraud Prosecution Section and proved his ability to work diligently and independently.

Andrew has particularly been a cornerstone to our Section's cases concerning consumer fraud within for-profit schools. In the school case we are both assigned to, Andrew completed voluminous document review, analyzed various legal issues, strategized with our Investigators, conducted interviews with consumers and potential witnesses, and completed several complex legal research projects. Over the course of the investigation, as complicated legal questions arose, Andrew could be counted on to produce thorough legal memoranda in an expeditious manner. Without being asked, Andrew would take the set of facts, research the relevant law, and consistently produce thoughtful work product. These memoranda have aided our Section Chief and supervising attorneys in pursuing the Attorney General's missions.

On another case that Andrew and I were both assigned to, I entrusted him to lead the investigation. He conducted legal research, analyzed subpoena productions, consumer data, and then independently interviewed dozens of consumers. His critical work kept the investigation moving and he was able to amass a large amount of evidence needed to establish Consumer Fraud Act violations in this multi-state investigation of a major finance company. Andrew is always eager to take on more work and can be relied on to complete tasks and meet deadlines without reminder.

In addition to his research and personal skills, Andrew has proven to be an excellent writer. I know from other Deputy Attorneys General in our Section that he is a valuable asset to many cases and notably contributed to lengthy briefs in opposition to a defendant's motion to dismiss. Further, he researched and drafted compelling legal arguments that contributed to our Office's prevailing motion.

In sum, I believe Andrew to be an individual of high character and moral integrity with strong analytical skills befitting of a judicial law clerk. I am confident Andrew will make an outstanding judicial clerk and offer my highest possible recommendation on his behalf. Please feel free to contact me if you have any questions. Thank you for your consideration.

Sincerely yours,

By:_____

Isabella R. Pitt
Deputy Attorney General
Consumer Fraud Prosecution

ANDREW F. ESOLDI
32 Cambridge Place, Englewood Cliffs, NJ 07632 | 201-575-6073 | andrew.esoldi@gmail.com

Attached is an excerpt from Plaintiff's Brief in Opposition to Defendant Max Recovery Group LLC's Motion to Dismiss in the action – Gurbir S. Grewal, Attorney General of the State of New Jersey, and Kaitlin A. Caruso, Acting Director of the New Jersey Division of Consumer Affairs v. Yellowstone Capital LLC et. al. This brief was filed together with Plaintiff's Brief in Opposition to Defendant Yellowstone Capital LLC's Motion to Dismiss on March 23, 2021 in the Superior Court of New Jersey, Hudson County, Chancery Division. Docket No. HUD-C-180-20. The Honorable Jeffrey R. Jablonski, A.J.S.C. denied both Motions to Dismiss in their entirety by Defendants Yellowstone Capital LLC and Max Recovery Group LLC on April 19, 2021.

The excerpt below is *my draft* of the Preliminary Statement, Statement of Facts, and Argument: Point II of the brief that I wrote individually. The Legal Standard and Argument: Points I and III were drafted in collaboration with colleagues. This draft was submitted through a chain of review to my Section Chief of the Consumer Fraud Prosecution section, three Assistant Attorneys General, the Deputy Director of the Division of Law, the Deputy Director of the Division of Consumer Affairs, and finally to Counsel to the Attorney General before it was filed in the Superior Court. I have received permission from my employer to use this excerpt as a writing sample.

PRELIMINARY STATEMENT

Plaintiffs Gurbir S. Grewal, Attorney General of the State of New Jersey (the "Attorney General"), and Kaitlin A. Caruso, Acting Director of the New Jersey Division of Consumer Affairs (the "Director," collectively "Plaintiffs"), submit this brief in opposition to Defendant Max Recovery Group LLC's ("Max Recovery" or "Defendant") Motion to Dismiss the Complaint pursuant to R. 4:6-2 (e). Max Recovery purports to "join[] the Yellowstone Defendants' Motion to Dismiss, and adopts the legal arguments made therein." (Def.'s Br. at 6 n.3). Accordingly, Plaintiffs incorporate by reference their opposition to Yellowstone MCA Defendants' and MCA Recovery's Motion to Dismiss in its entirety. To the extent those arguments apply to Max Recovery, the Court should reject them for the same reasons as set forth in Plaintiffs' opposition to Yellowstone MCA Defendants' and MCA Recovery's Motion to Dismiss.

STATEMENT OF FACTS

Max Recovery is a debt collection company affiliated with Yellowstone Capital LLC ("Yellowstone"); Yellowstone's parent Fundry LLC ("Fundry"); Yellowstone's subsidiaries High Speed Capital LLC ("High Speed"), World Global Capital LLC d/b/a YES Funding ("World Global"), HFH Merchant Services LLC ("HFH"), and Green Capital Funding LLC ("Green Capital")(collectively, "Yellowstone MCA Defendants"), and MCA Recovery (collectively, "Defendants"). Both Max Recovery and the other merchant cash advance collection defendant, MCA Recovery, engaged in debt collection from consumers on behalf of and in concert with Defendant Yellowstone Capital LLC ("Yellowstone"). (Compl. ¶ 27.) The Yellowstone MCA Defendants and Max Recovery are affiliated entities with an intertwined relationship (Compl. ¶¶ 1,

22.) As examples, Attorney John Doe serves as General Counsel to both entities simultaneously[1] and Yellowstone and Max Recovery have worked together to file UCC-1 financing statements against consumers. (Compl. ¶ 141(a).) Further facts concerning the intricacies of their intertwined relationship will be developed through discovery. Max Recovery presently maintains a principal place of business and mailing address at 55 Broadway, 3rd Floor, New York, New York 10006 (Compl. ¶ 22), but the scheme in which it participated emanated primarily from the Yellowstone Defendants' principal place of business in Jersey City, New Jersey (Compl. ¶¶ 8-10, 12-18.)

Yellowstone MCA Defendants purport to provide consumers a Merchant Cash Advance ("MCA") – a lump sum payment to purchase a portion of a business's future receivables at a discount – to be repaid by the consumer as set forth in the Yellowstone MCA Defendants' Merchant Agreements. (Compl. ¶ 28.) As set forth in detail in Plaintiffs' Complaint and brief in opposition to Yellowstone's Motion to Dismiss, the MCA agreements contain numerous unconscionable terms that, among other things, cause them to operate as unlawful, usurious loans rather than legitimate MCAs. Ibid.

Max Recovery's and MCA Recovery's role in the scheme is servicing the repayment of the MCA agreements and the collection of debts that were allegedly owed on those MCA agreements. (Compl. ¶ 27.) As part of the MCA agreements, Yellowstone MCA Defendants required consumers to execute an affidavit of Confession of Judgment ("COJ"). (Compl. ¶ 133.) The Yellowstone MCA Defendants required consumers to sign a COJ on behalf of their small businesses and in their individual capacities, which allowed a judgment against both the consumer's business and personal assets in the event of a default. (Compl. ¶ 75.) By signing the affidavit of COJ in advance of a

[1] See Cert. Exhibit 1 (Attorney John Doe is listed as the contact for Max Recovery on the Service of Process receipt to the consumer. He is the undersigned on a UCC Lien Notice to the consumer as VP and General Counsel to Max Recovery. This same attorney is also the General Counsel of Yellowstone.)

default, consumers waived their rights and consented to the entry of judgment without notice or hearing for the entire balance owed under the MCA agreement. (Compl. ¶ 74, 133.) These COJs also provided for judgment against the consumer for liquidated attorneys' fees in the amount of 25% of the outstanding balance, costs, expenses, disbursements, and "interest at the rate of 16% per annum from the date of the MCA agreement, or the highest amount allowed by law, whichever is greater[.]" (Compl. ¶ 76.)

Upon a consumer's alleged default, Yellowstone MCA Defendants provided the affidavits of COJ to Max Recovery to obtain judgments on its behalf. (Compl. ¶ 77.) Max Recovery, on behalf of Yellowstone, filed the COJ with its own Affidavit of Non-Payment, and a proposed form of judgment with the County Clerk without notice to the consumer. Ibid. The County Clerk then filed the judgment without a hearing or review by a judge, and without notice to the consumer. Ibid. Once judgment was entered, Max Recovery sought to collect by freezing consumers' bank accounts, often before the consumers were aware that a COJ was filed against them. (Compl. ¶ 82.) In some instances, consumers only became aware that a judgment was filed against them when they could not make payroll or pay business operating expenses due to their frozen bank accounts. (Compl. ¶ 83.) Max Recovery froze the consumers' personal and business assets until the full, accelerated balance owed under the MCA agreements plus interest and fees was satisfied. (Compl. ¶ 134.) The Yellowstone MCA Defendants even filed COJs and obtained judgments against consumers who did not default or otherwise breach the MCA Agreements and Max Recovery nevertheless improperly sought collection. (Compl. ¶¶ 135, 141.) In so doing, Max Recovery worked together with Yellowstone to file fraudulent and wrongful UCC-1 financing statements against consumers. (Compl. ¶ 141.)

ARGUMENT

POINT II

THE CONSUMER FRAUD ACT IS A BROAD REMEDIAL STATUTE THAT APPLIES TO MAX RECOVERY'S DEBT COLLECTION BUSINESSES

The language of the New Jersey Consumer Fraud Act ("CFA") evinces a clear legislative intent that its provisions be applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud. Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 264 (1997). It is intended to be liberally construed in favor of the consumer. See Barry v. Arrow Pontiac, 100 N.J. 57, 69 (1985); Cox v. Sears Roebuck & Co., 138 N.J. 2, 15 (1994). "The Legislature passed the [CFA] 'to permit the Attorney General to combat the increasingly widespread practice of defrauding the consumer.'" Id. at 14 (quoting Senate Committee, Statement to Senate Bill No. 199 (1960)). The Attorney General has independent authority to enforce it. Ibid.

Because the "fertility of the human mind to invent new schemes of fraud is so great," the CFA could not possibly enumerate all, or even most, of the areas and practices that it covers without severely retarding its broad remedial power to root out fraud in its myriad, nefarious manifestations. Lemelledo, 150 N.J. at 265, (quoting Kugler v. Romain, 58 N.J. 522, 543 n. 4, (1971)). Thus, to counteract newly devised schemes undermining the integrity of the marketplace, "[t]he history of the [CFA] [has been] one of constant expansion of consumer protection." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1997).

In prosecuting the CFA, the Attorney General may bring a "broader category of actions" than a private plaintiff. Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 250 (2005). This category "encompasses circumstances where there is no ascertainable loss to an individual but there exists an industry practice that the State seeks to curtail." Id.

> An unlawful practice under the CFA is the . . .
>
> > the act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby.
>
> [N.J.S.A. 56:8-2 (emphasis added).]

It is well-established that the CFA includes loans in its definition of what constitutes "merchandise." N.J.S.A. 56:8–1(a). Given the broad reach of the CFA, the New Jersey Supreme Court has concluded that it applies to the offering, sale, or provision of consumer credit. Lemelledo, 150 N.J. at 265. See also Assocs. Home Equity Servs., Inc. v. Troup, 343 N.J. Super. 254, 264–65 (App. Div. 2001) (holding that the CFA applies to the unconscionable terms of a home improvement loan secured by a mortgage on a borrower's home); Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 538 (App. Div. 2008) (holding that the CFA applies to the unconscionable loan-collection activities of an assignee of a retail installment sales contract).

A. Max Recovery's Debt Collection Efforts Are 'Subsequent Performance' of Yellowstone's Loans

Since the CFA applies to a loan, it also applies to the 'subsequent performance' of the loan which includes collection, enforcement, packing or modification. Here, Yellowstone contracted with consumers to provide them with a MCA, which Plaintiffs argue constitute unconscionable usurious loans in violation of the CFA. Max Recovery is a debt collection firm hired by Defendant Yellowstone Capital, LLC as a loan servicing agent. Yellowstone employed the services of Max Recovery and MCA Recovery to enforce and collect on the MCA agreements from consumers on its behalf. Yellowstone often acted in concert with Max Recovery in carrying out the debt collection. For example, on numerous occasions the same

attorney who serviced a loan on behalf of Max Recovery would also file the COJ on behalf of Yellowstone. The money the consumers remitted was still going to Yellowstone. Max Recovery's actions amounted to the 'subsequent performance' of Yellowstone's unconscionable usurious loans.

Max Recovery asserts that debt collectors are not subject to the CFA under "well settled" New Jersey precedent. Def.'s Br. at 9.) That contention is simply incorrect. In Gonzalez v. Wilshire Credit Corp., the New Jersey Supreme Court held that "collecting or enforcing a loan, whether by the lender or its assignee, constitutes the 'subsequent performance' of a loan, an activity falling within the CFA." 207 N.J. 557, 577-78 (2011). In Gonzalez, the plaintiff owned a home with a co-tenant. A mortgage company held a mortgage solely with the co-tenant, who passed away. Id. at 564. The mortgage company assigned the loan to the defendant, US Bank, and the bank had a servicing agent, defendant Wilshire, whose role was to collect payments on the loan and in the event of default, pursue foreclosure or other means to secure payment. Id. at 565. The plaintiff did default, but reached two settlement agreements with Wilshire. However, some time later the plaintiff sued Wilshire and US Bank alleging CFA violations premised on improper costs and fees in calculating plaintiff's arrearages and that Wilshire demanded amounts that were not due and owing. Id. at 569. Defendants argued that the conduct concerned post-judgment settlement agreements between Wilshire and plaintiff; therefore, these agreements and Wilshire's debt collection efforts were not subject to the CFA as the 'subsequent performance' of the original mortgage loan. Id. at 580.

The Court examined the breadth and scope of the CFA, holding that enforcement and collection upon a loan does in fact constitute 'subsequent performance', thereby falling within the scope of the CFA. Id. at 577-78. Because the continuing debt plaintiffs had with Wilshire

emanated from the original mortgage, Wilshire's actions in servicing collection on said debt constituted 'subsequent performance' of the original loan. Despite defendants' contention to the contrary, both the first and second agreements were nothing more than a recasting of the original loan, allowing Wilshire to recoup for past due payments for U.S. Bank. Id. at 580. The Court concluded that even if the later agreements stood alone and there was no original loan, Wilshire's collection activities would still be characterized as 'subsequent performance' in connection with that later agreement because that later agreement is an extension of consumer credit and as such is subject to the CFA. Id. at 581; see also Lemelledo, 150 N.J. at 265-66. The Court roundly rejected defendants' argument that the collection activities of a servicing agent, such as Wilshire, do not amount to the 'subsequent performance' of a loan, a covered activity under the CFA. Id. at 582.

The facts of Gonzalez are not dissimilar from the instant case. Max Recovery is carrying out the performance of Yellowstone's MCA agreements through servicing collection of the debt via the enforcement protections provided for in the agreements – COJ, UCC-1 financing statements, and security agreements. See Compl. ¶¶ 133, 140. Just as the assignment of the debt to US Bank and the appointment of Wilshire as the servicing agent merely substituted those entities for the original lender in its relationship with plaintiff, here the appointment of Max Recovery as debt collector for Yellowstone places them in a position in which their collection activities are characterized as 'subsequent performance' in connection with the extension of credit (e.g. the MCA agreement from Yellowstone, a covered activity under the CFA). Therefore, since Max Recovery's enforcement and collection efforts are 'in connection with,' and amount to a 'subsequent performance' of the original Yellowstone loans, Max Recovery falls within the ambit of the CFA. Furthermore, being that the MCAs from Yellowstone violate

the CFA as usurious loans with unconscionable terms, Max Recovery's conduct in implementing unconscionable terms to collect the debts and its use of harassment are unconscionable practices in connection with 'subsequent performance' of the original instrument.

The nexus between the original extension of credit to the consumer (the MCA) and the 'subsequent performance' on that extension of credit (the debt collection) could not be clearer. Max Recovery sought to collect debt by freezing consumers' bank accounts, often before the consumers were aware that a COJ was filed against them. (Compl. ¶ 82.) In some instances, the consumers only became aware that a judgment was filed against them when they could not make payroll or pay business operating expenses due to their frozen bank accounts. (Compl. ¶ 83.) Max Recovery would freeze the consumers' personal and business assets until the full, accelerated balance owed under the MCA agreements, plus interest and fees, was satisfied. (Compl. ¶ 134.) For example, Yellowstone and Max Recovery filed a UCC-1 financing statement against a Missouri Consumer claiming she had an outstanding balance when the consumer had already fulfilled all of her obligations under the MCA agreement. (Compl. ¶ 141(a).) Cases following Gonzalez, in both State and Federal court, have applied the CFA to debt collectors.[2] In holding that the activities during the loan modification process may constitute unlawful conduct violating the CFA, the Court in Laughlin v. Bank of Am., articulated that the legislative intent, language and policy goals of the CFA demand it extend to third parties and servicing agents such as debt collectors. 2014 WL 2602260 (D.N.J. June 11, 2014).

> It would be disingenuous to hold that a servicer would be free from the ramifications of violating the NJCFA if it engaged in unlawful conduct while participating in a loan modification. Just as fraud, deception, and other similar

[2] See D'Alessandro v. Ocwen Loan Servicing, LLC, 2018 WL 2337158, at *5 (D.N.J. May 23, 2018) (denying motion to dismiss; rejecting Defendant's argument that Plaintiff never bought any merchandise or real estate from Defendant and ruled that Plaintiff's pursuit of loan modification is in connection with the 'subsequent performance' of a mortgage and so falls under CFA).

> types of conduct are not justified in forming a loan, so are they not permitted in attempts to modify a loan.
>
> [Id. at *6.]

The language and holdings in these cases, particularly Gonzalez, is unequivocal. Collecting or enforcing a loan constitutes subsequent performance of that loan, which makes it an activity falling within the CFA. Because Max Recovery's unconscionable debt collection activities effectuated subsequent performance of Yellowstone unconscionable usurious loans, it is liable under the CFA.

Even as an assignee, Max Recovery could be held liable under the CFA. Direct contractual privity is not required[3] and for the plaintiff to prevail under the CFA, they do not have to prove the defendant was directly involved in the original contract. See, e.g., Gonzalez, 207 N.J. at 577-78 (collecting or enforcing a loan, whether by the lender or its assignee, constitutes the "subsequent performance" of a loan, an activity falling within the coverage of the CFA). Jefferson Loan Co., 397 N.J. Super. 520 (an assignee of Retail Installment Sales Contract "may be liable under the CFA for its own unconscionable commercial practices and activities related to its repossession and collection practices in connection with the subsequent performance of a RISC"); Carmen v. Metrocities Mortg. Corp., 2009 WL 1416038 *6 (D.N.J. May 18, 2009) ("[a]ssignees may be held liable under the NJCFA for their own subsequent performance of the contract"). Max Recovery is not an indirect supplier here. Rather, it is recouping for past due payments on the original MCA agreements between Yellowstone and the consumers. It was working in concert with and on behalf of Yellowstone. If an assignee can be found to be carrying out 'subsequent performance' a third party loan servicing agent can as well, making the CFA claim here even stronger.

[3] See Perth Amboy Iron Works, Inc. v. Am. Home Assurance Co., 226 N.J. Super. 200, 210–11 (App. Div. 1988) (noting that contractual privity between consumer and seller is not required to bring CFA claim).

B. Max Recovery Disregards Supreme Court Precedent and Relies on Inapplicable Caselaw Not Involving the Subsequent Performance of An Extension of Credit

Max Recovery urges the court to take an overly simplistic view that the CFA does not apply because it did not sell or offer to sell anything to anyone. This argument fails because it wholly ignores the New Jersey Supreme Court ruling in Gonzalez regarding 'subsequent performance' in the debt collection space. Max Recovery acts on behalf of Yellowstone and 'in connection with' its MCAs, carrying out 'subsequent performance' of the underlying MCAs, thereby falling squarely within the CFA.

Max Recovery relies heavily on DepoLink Court Reporting & Litigation Support Services v. Rochman 430 N.J. Super. 325 (App. Div. 2013), which is easily distinguishable given the attenuated link between the creditor and the debt collector in that case. In Depolink, an attorney, Rochman, engaged a court reporting service for two depositions; he received the completed transcripts, but failed to pay the invoices. Id. at 331. DepoLink hired a collection agency to pursue Rochman and when that was unsuccessful, sued Rochman for the unpaid invoices. Ibid. Rochman filed a third-party complaint against the collection agency, alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), the CFA, and common law fraud. Id. at 332. The court dismissed Rochman's third-party claims against the debt collector. Ibid.

The Appellate Division in its analysis separated the collection agency from the original lender, DepoLink, and held that the CFA was inapplicable to the collection agency because "any misrepresentations by the collection agency, even if made, were not in connection with the sale of merchandise to defendant." Id. at 337. Unlike Gonzalez and unlike the case at bar, the debt collection was a separate matter handled by a separate company after Rochman defaulted. The Court found that there was not enough of a nexus for it to constitute a 'subsequent performance'

on the original loan or provision of credit, because the collection efforts were too far removed from the original loan.

In stark contrast, here Max Recovery was not brought in only after a consumer defaulted to collect on the debt, but rather Max Recovery had a pre-existing and ongoing relationship with Yellowstone by which it routinely sought to collect debts from consumers to whom Yellowstone extended credit. Yellowstone and Max Recovery's businesses are so inextricably linked that they even share a General Counsel. Because Yellowstone employed Max Recovery as an apparatus to effectuate 'subsequent performance' of the unconscionable usurious loans, Max Recovery is participating in the underlying extension of consumer credit. That fact alone is enough to place Max Recovery's actions within the scope of the CFA.

The myriad cases cited by Max Recovery, including Chulsky v. Hudson Law Offices, P.C., 777 F.Supp.2d 823, 847 (D.N.J. 2011), Hoffmann v. Encore Capital Group, Inc., 2008 WL 5245306 (App. Div. Dec. 18, 2008), Gomez v. Forster & Garbus LLP, 2019 WL 5418090 (D.N.J. Oct. 22, 2019), Joaquin v. Lonstein Law Office,P.C., 2017 WL 2784708 (D.N.J. June 27, 2017), Boyko v. Am. Int'l Grp., Inc. 2009 WL 5194431 (D.N.J. Dec. 23, 2009) and Brancato v. Specialized Loan Servicing, LLC, 2009 WL 2770137 (D.N.J. June 8, 2018), are all distinguishable from this matter. First, they all involve a private plaintiff. The instant Action is being brought by the State against a corporation, Yellowstone, which as of 2017 had advanced hundreds of millions of dollars to small businesses. See Compl. ¶ 4. Of the $1.5 billion collected in judgments nationwide from 2012 to 2018, Yellowstone was responsible for one-fourth of those collections. Ibid. Max Recovery was a major player in this operation through its debt collection activity. Hence, the need to protect consumers is significant. The CFA confers upon

the Attorney General "the broadest kind of power to act in the interest of the consumer public." Levin v. Lewis, 179 N. J. Super. 193, 200 (App. Div. 1981).

Second, all of these matters can be distinguished as set forth below. In Hoffman v. Encore Capital Group, Inc., defendant Encore Capital purchased consumer Hoffman's defaulted debt, then sued Hoffman for collection. The court held there was no CFA claim because Encore Capital purchased the defaulted debt purely for collection purposes and was never involved in the original provision of credit. 2008 WL 5245306, at *3. Similar to Hoffman, the Court in Gomez v. Forster & Garbus LLP found none of the defendants' alleged malfeasance to be covered by the CFA because they did not participate in the underlying extension of consumer credit. 2019 WL 5418090, at *6. This case is distinguishable, as Max Recovery did not purchase any debt. Rather, Max Recovery worked on behalf of and in concert with Yellowstone. The only way for consumers to obtain an MCA from Yellowstone was to execute an affidavit of COJ, which allowed Max Recovery to obtain a judgment against the consumers in the event of a default. (Compl. ¶¶ 73, 74.) The intricacies of their relationship likely go well beyond that. In any case, it is clear that Plaintiffs', in their Complaint, have shown that Max Recovery played a substantial role in Yellowstone's provision of credit to consumers. (Compl. ¶¶ 22, 24, 73, 74, 77, 78, 135, 141(a).)

Joaquin v. Lonstein Law Office, P.C., draws its analysis from DepoLink, holding that Defendants' allegedly fraudulent attempts to collect for unpaid subscription fees were conducted on behalf of a third party – DIRECTV – and did not involve the sale of merchandise to Plaintiff. 2017 WL 2784708, at *1. Contrary to this case, Max Recovery was not brought in as an outside party to collect the debt on the MCAs after it went unpaid. Also, like DepoLink, Joaquin does not address the issue of 'subsequent performance'. Max Recovery then cites Brancato v.

Specialized Loan Servicing, LLC. This case applies Third Circuit rationale set forth in Huertas v. Galaxy Asset Mgmt., 641 F.3d 28 (3d Cir. 2011), not NJ Supreme Court rationale, to its conclusion that Plaintiff, as a debtor, is unable to bring a claim against SLS, a mortgage servicer under the CFA because he never bought any merchandise from them. 2018 WL 2770137 at *7. But as we have shown above, the CFA encompasses the activities of debt collectors because the servicing collection on debt is 'in connection with' and constitutes 'subsequent performance' of the original provision of consumer credit.

Boyko v. American Intern. Group, Inc., a case decided two years before Gonzalez and cited by the Max Recovery, addresses 'subsequent performance'. There, the Court reasoned that "the subsequent performance of such person aforesaid" language is "seemingly limited" to the original seller. 2009 WL 5194431 at *4. In its view, collection efforts on behalf of another party do not fall within the scope of the CFA's 'subsequent performance' language. This Court should not rely on Boyko because it was decided before Gonzalez and because it was not adjudicated in New Jersey State courts. Rather, this Court should look to the clear language of Lemelledo, 150 N.J. at 265, "Given the broad language of the CFA, we conclude that its terms apply to the offering, sale, or provision of consumer credit", and Gonzalez, 150 N.J. at 265 "collecting or enforcing a loan, whether by the lender or its assignee, constitutes the 'subsequent performance' of a loan, an activity falling within the coverage of the CFA", in making its determination here.

C. Max Recovery is Culpable Under the CFA as Yellowstone's Agent

Max Recovery was Yellowstone's agent for debt collection on its MCA agreements. The New Jersey Supreme Court has ruled that "[a]n agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent." Sears Mortgage Corp. v. Rose, 134 N.J. 326, 337 (1993). An agreement specifying

the relationship is unnecessary because "the law will look to their conduct and not to their intent or their words as between themselves but to their factual relation." Id.

In their Complaint, Plaintiffs alleged a business arrangement between Yellowstone and Max Recovery whereby Max Recovery collected debts allegedly owed on MCA agreements on Yellowstone's behalf. Specifically, Plaintiffs alleged that consumers could obtain an MCA only if they agreed to a COJ, which was serviced by Max Recovery; that Max Recovery froze consumers' bank accounts, often before consumers were aware that a COJ was filed against them; and that Max Recovery froze consumers' personal and business assets until the full, accelerated balance owed to Yellowstone plus interest and fees was satisfied. (Compl. ¶¶ 73, 74, 82, 134.) Moreover, any money collected went back to Yellowstone, not to Max Recovery. (Compl. ¶ 43.) Given this business relationship, an agency relationship existed between Yellowstone and Max Recovery. Therefore, as an agent of Yellowstone, Max Recovery can be held liable under the CFA.

D. The Timing of Debt Collection Activity in Relation to Default has No Bearing on whether it is Subject to the CFA.

Defendants also cite to several unpublished cases (all but one of which are from federal courts) holding that debt collection activity by third parties or debt buyers is not subject to the CFA where the debt collection activity is distinct from the original transaction. Chulsky v. Hudson Law Offices, P.C., a case decided before Gonzalez, places emphasis on whether the debt had already been in default when acquired by a debt buyer. 777 F.Supp.2d at 847. The court in Chulsky reasoned that buyers of defaulted debt should not be liable under the CFA because at that point there is no nexus between the original lender and consumer. The default breaks the chain, taking the collection activity outside the realm of 'subsequent performance' because the buyers of the debt are not effectuating the original agreement. However, in reaching this

conclusion, the court acknowledged that the case law on this issue is so unsettled that it offers incomplete guidance on how the New Jersey Supreme Court would rule. Id. at 843. It was only a few months later, in August 2011, that the New Jersey Supreme Court issued the Gonzalez decision, which offered very clear guidance and undercuts Chulsky.

The court in Chulsky scrutinized other cases, notably Hoffman v. Encore Capital Grp., Inc., 2008 WL 5245306 (App. Div. Dec. 18, 2008) saying that Hoffman does not offer any reason why purchasers of defaulted debt who engage in collection activities should be treated differently than purchasers of non-defaulted debt, like in Jefferson Loan, who engage in such activities. Id. at 841. Because of the unsettled law, the Chulsky court ended up imputing a federal statute, the FDCPA, which is aimed specifically at debt buyers, into the CFA. Id. at 847. The Court reasoned that due to the New Jersey legislature's failure to enact a bill establishing a New Jersey version of the FDCPA, the CFA should be read as excluding the debt collection activities of debt buyers. Ibid.

However, that line of analysis reads into the CFA a concept that is not there – that because there is no FDCPA component to the CFA, the CFA cannot apply to debt acquired in default. As discussed above, the CFA provisions are to be applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud. Barry v. Arrow Pontiac, 100 N.J. 57, 69 (1985). The binding authority on this issue, Lemelledo, Gonzalez, and Jefferson Loan Co., all support the notion that the CFA encompasses the activities of debt collectors, whether or not they buy the debt, whether or not they are assignees, and whether or not there is contractual privity. The analysis should not turn on the issue of acquiring debt in default versus acquiring it pre-default. Therefore, the status of default should not be dispositive in finding that the CFA applies to Max Recovery or MCA Recovery.

CONCLUSION

For the foregoing reasons, Max Recovery's Motion to Dismiss should be denied in its entirety with prejudice.

Applicant Details

First Name	**Sami**
Last Name	**Ghanem**
Citizenship Status	**U. S. Citizen**
Email Address	**sg3wu@virginia.edu**
Address	**Address** Street **525 Seymour Road, Apt 1** City **Charlottesville** State/Territory **Virginia** Zip **22903** Country **United States**
Contact Phone Number	**8054180755**

Applicant Education

BA/BS From	**University of California-Santa Barbara**
Date of BA/BS	**March 2019**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 15, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Journal of Social Policy and the Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Lile Intramural Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just The Beginning Organization**

Recommenders

Frampton, Thomas
tframpton@law.virginia.edu
(434) 924-4663

Rutherglen, George
grutherglen@law.virginia.edu
(434) 924-7015

Hodges, Ann
ahodges@law.virginia.edu
804-339-9440

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sami Ghanem

525 Seymour Road, Apt 1, Charlottesville, VA 22903
(805) 418-0755 • sg3wu@virginia.edu

March 5, 2022

The Honorable Lewis J. Liman
U.S. District Court, Southern District of New York
500 Pearl St.
New York, NY 10007-1312

Dear Judge Liman:

I am a third-year law student at the University of Virginia School of Law and I am interested in a position in your chambers as a law clerk for the 2024-2025 term. I firmly believe that a clerkship in your chambers is the best way for me to begin my litigation career, particularly through exposure to a wide variety of litigation from start to finish. I anticipate returning to Fried Frank in New York in order to practice, and I would like to continue to practice in the city. I would be happy to gain further experience and to be of service in your chambers.

Enclosed within my application is my resume, my law school transcript and my undergraduate transcript. I have also enclosed my writing sample of a case comment on *Spencer v. Virginia State University*, prepared during my independent study class with Professor George Rutherglen, and my writing sample of a memo on Second Circuit common law regarding good-faith jury instructions, prepared during my summer position at Fried Frank. Professor George Rutherglen, Professor Ann Hodges, and Professor Thomas Frampton have agreed to submit letters of recommendation on my behalf to your chambers. They have also gladly agreed to directly speak to you regarding my application. Professor Rutherglen's home phone number is 434-977-0687 and his office phone number is 434-924-7015; Professor Hodges' phone number is 804-339-9440; Professor Frampton's phone number is 202-352-8341.

Thank you for your consideration of my application.

Sincerely,

Sami Ghanem

Sami Ghanem

525 Seymour Road, Charlottesville, VA 22903 • (805) 418-0755 • sg3wu@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2022

- *Virginia Journal of Social Policy and the Law*, Editorial Board Member
- Muslim Law Student Association, President, Treasurer, Member-at-large
- Middle Eastern and North African Association, Treasurer
- National Lawyers Guild, Treasurer
- American Constitutional Society, Membership Development Chair
- Lile Intramural Moot Court Competitor
- Virginia Law Ambassador
- Innocence Project Pro Bono

University of California, Santa Barbara, Goleta, CA
B.A., Political Science, with Honors, June 2019

EXPERIENCE

Fried, Frank, Harris, Shriver & Jacobson LLP, New York, NY
Summer Law Clerk, May – August 2021

- Created memorandum on good-faith jury instruction jurisprudence in the Second Circuit
- Prepared order of protection petition and appeared in family court with pro bono client

Professor George Rutherglen, University of Virginia School of Law, Charlottesville, VA
Research Assistant, May – August 2020

- Analyzed employment law developments and revised textbook for publication

Ventura County Public Defenders' Office, Ventura, CA
Winter Pro Bono Legal Intern, January 2020

- Drafted procedural motions, oral arguments, and memoranda for public defender's cases
- Researched criminal law related to client issues and attended hearings and trials

Office of Congresswoman Julia Brownley, Thousand Oaks, CA
Congressional Intern, January – April 2019

- Communicated daily with constituents and agencies to resolve Social Security, Veterans' Affairs, and immigration-related issues
- Coordinated logistics for district-based projects, such as county art competitions

University of California, Santa Barbara, Goleta, CA
Research Assistant for Professor Laurie Freeman, January – March 2019

- Researched data for books on nuclear waste disposal and a history of yellow journalism

Research Assistant for Professor Hahrie Han, January – June 2018

- Created and organized database for thousands of field observations on U.S. interest groups

Model United Nations at UC Santa Barbara, Goleta, CA
Director-General, August 2016 – June 2018

- Managed UCSB-hosted college and high-school conferences and trained committee chairs
- Represented UCSB in collegiate Model UN national competitions

INTERESTS

Table tennis, soccer (Liverpool FC supporter), chess, biking, hiking, foosball, exploring libraries, fishing

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Sami Ghanem

Date: February 09, 2022
Record ID: sg3wu

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2019			
LAW	6000	Civil Procedure	4	B+	Rutherglen,George
LAW	6002	Contracts	4	B+	Geis,George Samuel
LAW	6003	Criminal Law	3	B+	Bowers,Josh
LAW	6004	Legal Research and Writing I	1	S	Buck,Donna Ruth
LAW	6007	Torts	4	B	Barzun,Charles Lowell
		SPRING 2020			
LAW	6001	Constitutional Law	4	CR	Matthew,Dayna Bowen
LAW	6005	Lgl Research & Writing II (YR)	2	S	Buck,Donna Ruth
LAW	9252	Poverty in Law/Lit/Culture	3	CR	Langlet,Mark F
LAW	6006	Property	4	CR	Johnson,Alex M
LAW	7098	Public Interest Law & Advocacy	2	CR	Shin,Crystal Sue
		FALL 2020			
LAW	6102	Administrative Law	4	B	Duffy,John F
LAW	7022	Employment Discrimination	3	B+	Rutherglen,George
LAW	8813	Independent Research	3	A-	Rutherglen,George
LAW	7059	Labor Law	3	B+	Hodges,Ann C
LAW	7067	National Security Law	3	B+	Deeks,Ashley
		SPRING 2021			
LAW	7123	Class Actions/Aggregate Litgtn	3	B+	Ballenger,James Scott
LAW	9240	Con Law II: Poverty	3	B+	Goluboff,Risa L
LAW	6104	Evidence	4	B+	Brown,Darryl Keith
LAW	8811	Independent Research	1	A	Frampton,Thomas Ward
LAW	9088	Sup Court Justices & Judging	3	B+	Howard,A. E. Dick
		FALL 2021			
LAW	9283	Constitutionalism and Culture	3	B+	Howard,A. E. Dick
LAW	8812	Independent Research	2	A-	Hodges,Ann C
LAW	7189	Internet Law	2	A	Oliar,Dotan
LAW	7071	Professional Responsibility	3	B	Mitchell,Paul Gregory
LAW	9089	Seminar in Ethical Values (YR)	0	YR	Goluboff,Risa L
LAW	8026	Taking Effective Depositions	2	B+	Bognar Searcy,Ellen Catherine
		SPRING 2022			
LAW	6105	Federal Courts	4	NG	Ahdout,Zimra Payvand
LAW	8812	Independent Research	2	NG	Shepherd,Lois L.
LAW	7090	Regulatn of Political Process	3	NG	Gilbert,Michael
LAW	9090	Seminar in Ethical Values (YR)	1	NG	Goluboff,Risa L
LAW	9081	Trial Advocacy	3	NG	Stolpe,Kristin Elysse

UCSB Gaucho On-Line Data

UNOFFICIAL TRANSCRIPT

Welcome SAMI GHANEM

Print with Legal Name

Print with Name

University of California, Santa Barbara

1/2/2020 6:50:18 PM

Unofficial Transcript

SAMI GHANEM
Perm Number: 8182164

College/ Objective/ Major/ Emphasis	Degree Status	Conferral Date
L&S/ BA/ POLS	Awarded	3/22/2019

Fall 2014

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
GEOG 5 -PEOPLE/PLACE/ENVIRO		C	24281	4.0	4.0	4.0	8.00	
HIST 2A -WORLD HISTORY		B-	25825	4.0	4.0	4.0	10.80	
MATH 34A -CALC FOR SOCIAL SCI		B	31476	4.0	4.0	4.0	12.00	
Quarter Total (Undergrad)	**GPA**	**2.56**		12.0	12.0	12.0	30.80	
Cumulative Total (Undergrad)	**GPA**	**2.56**		12.0	12.0	12.0	30.80	

Winter 2015

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
MATH 34B -CALC-SOC & LIFE SCI		NP	32391	4.0	0.0	0.0	0.00	Repeated
WRIT 2 -ACADEMIC WRITING		B+	50070	4.0	4.0	4.0	13.20	
Quarter Total (Undergrad)	**GPA**	**3.30**		8.0	4.0	4.0	13.20	
Cumulative Total (Undergrad)	**GPA**	**2.75**		20.0	16.0	16.0	44.00	

Spring 2015

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
MATH 34B -CALC-SOC & LIFE SCI		C-	29710	4.0	4.0	4.0	6.80	Repeat
MUS 17 -WORLD MUSIC		D-	33381	4.0	4.0	4.0	2.80	Repeated
PSTAT 5A -STATISTICS		F	71753	5.0	0.0	5.0	0.00	Repeated
Quarter Total (Undergrad)	**GPA**	**0.73**		13.0	8.0	13.0	9.60	
Cumulative Total (Undergrad)	**GPA**	**1.84**		33.0	24.0	29.0	53.60	
On Probation								

Fall 2015

14 Messages Feedback Help Logout

PSTAT 5A -STATISTICS		**W**	41715	5.0	0.0	0.0	0.00
Quarter Total (Undergrad)	**GPA**	**0.00**		0.0	0.0	0.0	0.00
Cumulative Total (Undergrad)	**GPA**	**1.84**		33.0	24.0	29.0	53.60
On Probation							

Summer 2016

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
CH ST 138 -BARRIO POPULAR CULT		**A**	17384	4.0	4.0	4.0	16.00	
ENGL 10 -INTRO TO LIT STUDY		**A**	05942	4.0	4.0	4.0	16.00	
HIST 17C -AMERICAN PEOPLE		**A**	08144	4.0	4.0	4.0	16.00	
HIST 4B -WESTERN CIVILIZATIO		**A-**	16600	4.0	4.0	4.0	14.80	
Quarter Total (Undergrad)	**GPA**	**3.92**		16.0	16.0	16.0	62.80	
Cumulative Total (Undergrad)	**GPA**	**2.58**		49.0	40.0	45.0	116.40	
On Probation								

Fall 2016

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
C LIT 33 -AFRICAN LITERATURES		**A-**	53728	4.0	4.0	4.0	14.80	
EARTH 20 -GEOL CATASTROPHES		**A-**	11577	4.0	4.0	4.0	14.80	
ENGL 15 -SHAKESPEARE		**B+**	17277	4.0	4.0	4.0	13.20	
Quarter Total (Undergrad)	**GPA**	**3.56**		12.0	12.0	12.0	42.80	
Cumulative Total (Undergrad)	**GPA**	**2.79**		61.0	52.0	57.0	159.20	

Winter 2017

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
ECON 1 -PRINCIPL ECON MICRO		**P**	13847	4.0	4.0	0.0	0.00	
POL S 12 -AMER GOV & POLITICS		**A-**	41723	4.0	4.0	4.0	14.80	
WRIT 105PD-WRIT PUB DISCOURSE		**A-**	49197	4.0	4.0	4.0	14.80	
Quarter Total (Undergrad)	**GPA**	**3.70**		12.0	12.0	8.0	29.60	
Cumulative Total (Undergrad)	**GPA**	**2.90**		73.0	64.0	65.0	188.80	

Spring 2017

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
CLASS 150 -FALL ANC REPUBLIC		**A-**	51466	4.0	4.0	4.0	14.80	
ECON 9 -INTRO TO ECONOMICS		**B**	12633	4.0	2.0	2.0	6.00	
INT 101 -LEGAL CAREER & LAW		**P**	26377	1.0	1.0	0.0	0.00	
MUS 17 -WORLD MUSIC		**A**	33985	4.0	0.0	4.0	16.00	Repeat
POL S 6 -INTRO COMP POLITICS		**A-**	38521	4.0	4.0	4.0	14.80	
Quarter Total (Undergrad)	**GPA**	**3.68**		17.0	11.0	14.0	51.60	
Repeat Adjustment						-4.0	-2.80	
Cumulative Total (Undergrad)	**GPA**	**3.16**		90.0	75.0	75.0	237.60	

Summer 2017

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
POL S 7 -INTRO TO IR		**A**	11981	4.0	4.0	4.0	16.00	
POL S 1 -INTRO TO POL PHIL		**A-**	11908	4.0	4.0	4.0	14.80	
PSTAT 5A -STATISTICS		**A**	12419	5.0	5.0	5.0	20.00	Repeat
Quarter Total (Undergrad)	**GPA**	**3.90**		13.0	13.0	13.0	50.80	

Fall 2017

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
COMM 88 -COMM RESEARCH METH		A-	49205	5.0	5.0	5.0	18.50	
ENV S 177 -COMP ENVIRON POL		A	56226	4.0	4.0	4.0	16.00	
ES 1- 43A -BEGIN WEIGHT TRAIN		P	20214	0.5	0.5	0.0	0.00	
POL S 153 -POL INTEREST GROUPS		B+	54833	4.0	4.0	4.0	13.20	
POL S 121 -INTERNATL POLITICS		A-	54668	4.0	4.0	4.0	14.80	
Quarter Total (Undergrad)	**GPA**	**3.67**		17.5	17.5	17.0	62.50	
Cumulative Total (Undergrad)	**GPA**	**3.50**		120.5	105.5	100.0	350.90	

Winter 2018

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
POL S 161 -US MINORITY POL		A-	56853	4.0	4.0	4.0	14.80	
POL S 119JW-ETHICAL ISSUES IR		A	56697	4.0	4.0	4.0	16.00	
POL S 186 -INTRO INTL POL ECON		A-	57083	4.0	4.0	4.0	14.80	
POL S 135 -GOV'T/POL OF JAPAN		A-	42143	4.0	4.0	4.0	14.80	
Quarter Total (Undergrad)	**GPA**	**3.77**		16.0	16.0	16.0	60.40	
Cumulative Total (Undergrad)	**GPA**	**3.54**		136.5	121.5	116.0	411.30	
Dean's Honors (L&S)								

Spring 2018

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
POL S 126 -INTERNATIO SECURITY		A	55798	4.0	4.0	4.0	16.00	
POL S 106MO-SPECIAL TOPICS		A-	55723	4.0	4.0	4.0	14.80	
POL S 196 -SR SEMINAR POL SCI		A+	55772	4.0	4.0	4.0	16.00	
POL S 147 -DEVELOP COUNTRY POL		P	40634	4.0	4.0	0.0	0.00	
Quarter Total (Undergrad)	**GPA**	**3.90**		16.0	16.0	12.0	46.80	
Cumulative Total (Undergrad)	**GPA**	**3.57**		152.5	137.5	128.0	458.10	
Dean's Honors (L&S)								

Winter 2019

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
POLS XSB199RA-Indep Research Asst		A+		3.0	3.0	3.0	12.00	
Quarter Total (Undergrad)	**GPA**	**4.00**		3.0	3.0	3.0	12.00	
Cumulative Total (Undergrad)	**GPA**	**3.58**		155.5	140.5	131.0	470.10	

Transfer Work Undergraduate Total: 39.5
UC & Transfer Work Undergraduate Total: 180.0

March 14, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am happy to write on behalf of Sami Ghanem, who I understand is applying for a clerkship in your chambers. I don't know Sami as well as I know many of the students for whom I write letters, but I did supervise an independent writing assignment he completed last semester, and we had a few lengthy conversations, both about the paper and life, during that process. Sami is outgoing, highly motivated, polite (almost to a fault), and I think he would make a fine judicial law clerk.

Sami's writing project was a Case Comment on the issue of venue for failure-to-register prosecutions under the Sex Offender Registration and Notification Act (SORNA). He wrote in defense of the Seventh Circuit's approach, United States v. Haslage, 853 F.3d 331 (7th Cir. 2017) (holding venue does not lie in the district from which offender departs), which thus far stands in conflict with every other appellate court to consider the question. He adopts a historical approach, underscoring the importance of the vicinage requirement at common law, and then argues that the Seventh Circuit's idiosyncratic approach is more faithful to this context and the statute's plain text than the alternative. His draft (at least as presently written) breaks little new ground, but it demonstrates an ability to clearly explain the split and marshal a strong argument in favor of his preferred position.

Sami is highly self-motivated and extremely outgoing; you get the sense that he would be comfortable in whatever environment he might be thrown. (This is, I think, a product of his upbringing: he lived in six different states growing up.) He is currently planning on working for a firm after law school, but he also cares deeply about using the law to address social and political inequality—particularly discrimination against Arab-Americans and Muslim-Americans. Eventually, he hopes to do plaintiff-side work involving employment law, class actions, consumer protection, and environmental law.

If you have any questions or if there is any additional information I can provide, please do not hesitate to contact me via phone (202-352-8341) or email (tframpton@law.virginia.edu).

Sincerely,

Thomas Frampton

March 07, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:
I am writing on behalf of Sami Ghanem, a rising third-year law student, who has applied for a clerkship with you. Sami received a B+ in my course in Civil Procedure and a B+ in Employment Discrimination. He also worked as my research assistant last summer. He is capable, inquisitive, and unfailingly courteous. I am happy to recommend him to you.

Both Civil Procedure and Employment Discrimination are demanding courses. They proceed both at the level of technical detail and of fundamental principles. In Civil Procedure, the Federal Rules and decisions interpreting them are intricate and controversial, and the whole course revolves around the meaning of due process. In Employment Discrimination, the burden of proof on a variety of issues is decisive in many cases, and the overall aim of the subject is to foster equality in employment. Sami did quite well in both courses, without getting lost in either the details or the abstractions but in seeing how they each affected each other. He is a very smart and diligent student.

These qualities came out strongly in his work for me as a research assistant. He assisted me in the last stages of publishing a book, where numerous loose ends all have to be tied up. He was exemplary in checking the citations in my manuscript and making sure they were up to date. He proofread the text and made many helpful suggestions. And he also took on the often tedious task of making an index. Without him, it would have been much more difficult to bring this book project to a successful conclusion.

Sami has been very active in the life of our law school, serving in numerous organizations, from the Virginia Journal of Law and Social Policy to the Innocence Project. All of these activities demonstrate his commitment to educating himself as a lawyer, outside as well as inside the classroom. He intends to have a career in litigation and he sees a clerkship as a valuable learning experience, where he can see first hand how cases are litigated and how decisions are made. Just as a clerkship would contribute to his career plans, he would contribute effectively to the work in any judge's chambers.

Sami has met the disruptions to legal education caused by the pandemic with poise and equanimity, adjusting well to the remote learning and social distancing that has dominated the law school experience this year. Based on this experience, I believe, he is well suited to meet the challenges of a clerkship, whatever they might be. He has the intellectual and personal qualities to be an excellent law clerk and I strongly recommend him to you.

Very truly yours,

George Rutherglen

John Barbee Minor Distinguished Professor of Law
Earle K. Shawe Professor of Employment Law
University of Virginia School of Law
580 Massie Road Charlottesville, VA 22903-1738
PHONE: 434.924.7015
FAX: 434.924.7536
grutherglen@law.virginia.edu • www.law.virginia.edu

April 04, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Clerkship Applicant Sami Ghanem

Dear Judge Liman:

This is a letter of recommendation for Sami Ghanem, who is applying to be a clerk in your chambers. On the basis of Mr. Ghanem's performance in my Labor Law class and my subsequent work with him on his paper on the Equal Pay Act, I strongly recommend him for the clerkship.

I first met Mr. Ghanem as a student in my Fall 2020 Labor Law class. The fall semester was challenging due to the pandemic, resulting in a hybrid class that combined in-person and online students. Mr. Ghanem was one of the students who attended in-person. He quickly proved himself a thoughtful, well-prepared, and enthusiastic participant in class discussion. He was one of a small number of students who made a particularly noteworthy contribution to the discussion in at least one class. He performed well on the exam and short paper also, resulting in a grade of B+ in a very strong class, with a mandated curve and many 3L students.

After the class, Mr. Ghanem reached out to me to review his article on the Equal Pay Act. The article focused specifically on a Fourth Circuit decision addressing the question of whether salary history is a factor other than sex under the statute. The topic Mr. Ghanem chose is the subject of a significant circuit split and one of substantial current importance in the field of gender discrimination. He had a creative introduction to the paper based on his connection to the University of Virginia and its gender-based pay differential among the faculty. The first draft that I read was a very solid piece of legal analysis. Since that time, he has continued to work very hard on the paper, honing his analysis and revising and polishing his writing, resulting in an even better product.

One of Mr. Ghanem's strengths is his desire to continue learn and improve in every respect. He is that rare student who sought detailed feedback on his exam performance. His request that I review his paper on the Equal Pay Act similarly demonstrates that important quality of openness to continual learning and advice from others more experienced.

Mr. Ghanem's summer experiences have helped to prepare him to be successful in the clerkship. Last summer, he did research for Professor George Rutherglen, an expert in employment law. And during the current summer, he is working at the well-regarded law firm of Fried, Frank, Harris, Shriver & Jacobson. His analytical and communications skills will develop further as a result of his work at the law firm.

Mr. Ghanem has been an outstanding citizen of the law school, participating in multiple extracurricular activities. He has been a leader in both the Muslim Law Students Association and the Middle Eastern and North African Association, and served as an Editorial Board member of the Virginia Journal of Social Policy and the Law. He has enhanced his education through involvement in Moot Court and the Innocence Project. His enthusiasm for the law school is reflected in his role as a Virginia Law Ambassador. From my observation, he is respectful and considerate of faculty, staff and students at the law school.

In sum, Sami Ghanem has my strong recommendation for the clerkship with your chambers. In addition to his legal talents, he will be a delightful colleague who will work well with all in chambers. If you have any additional questions about Mr. Ghanem, please feel free to reach out to me at either 804-339-9440 or ahodges@law.virginia.edu.

Sincerely,

Ann C. Hodges
Visiting Professor of Law, University of Virginia
Professor of Law Emerita, University of Richmond

M E M O R A N D U M

May 28, 2021

From: Sami Ghanem

Re: Good-Faith Jury Instruction - SDNY Charges

Names and personal information have been redacted.

Ms. Jane Smith is a resident of the United States. Ms. Smith and her husband were charged in the District Court of the Southern District of New York with creating fraudulent representations in visa applications in order to support those applications for domestic workers to come to the United States and be in their service. These offenses were charged as violating 18 U.S.C. § 1001 and § 1546(a). Ms. Smith maintains that she had no knowledge or involvement in the creation and fraudulent representation on these visa applications. She maintains that her husband always managed the financial and family affairs of their household, and that she had no reason otherwise to question or doubt the visa application process that was performed by her husband. This memo provides an overview of the legal principles that must guide a good-faith jury instruction in the second circuit. It proposes a jury instruction which would follow these principles. Finally, it addresses the Second Circuit's principle of allowing courts the discretion to choose whether to explain good-faith jury defenses, before then discussing how the defense could motivate the court to do so for Ms. Smith's case.

I. Overview

18 U.S.C. § 1001 criminalizes the act of making false statements to a federal government official. An act falls within the statute if actor "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States knowingly and willfully:"

> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

The *mens rea* of the crime involves "knowingly and willfully" committing the crime, and the Second Circuit has already affirmed that "conduct [is] not 'willful' if it was due to negligence, inadvertence, or mistake or was the result of a good faith misunderstanding." *United States v. McGinn*, 787 F.3d 116, 126 (2d Cir. 2015). As the evidence indicates, Smith "lacked any specific

knowledge or intent with regard to the visa process." *DP Letter,* pg 2. A good-faith defense, if accepted, completely defeats the charge levied against the defendant by negating the necessary willfulness element. Therefore, any instruction that includes this defense must also instruct that the "theory if believed [justifies] acquittal on those charges." *United States v. Regan*, 937 F.2d 823, 826-827 (2d Cir. 1991).

18 U.S.C. § 1546(a) criminalizes the fraudulent use or the falsification of information on visas/visa applications. The statute penalizes "whoever *knowingly* makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, *knowingly* subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or *knowingly* presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact…" [emphasis added].

A successful good-faith defense also negates any charges of knowledge of falsity.[1] As a result, the jury instruction would need to acknowledge this. See *Regan*, 937 F.2d at 826-827. Lastly, the court, under the common law of the Second Circuit, has the discretion to decide whether to explain the meaning of good-faith in the law. The combination of precedent and the circumstances of our case lend some strength to our argument that specific language explaining good-faith should be included in the instruction.

II. Legal Framework

A. Good-faith Jury Instruction Principles Required by the Second Circuit

In order for a good-faith jury instruction to be approved by the court in the Second Circuit, it must fulfill certain principles that prevent the jury from being misled about the meaning of the instruction and that ensure the instruction is truly based in the evidence.

First, a defense in the good-faith instruction is admissible only if this defense is founded in the evidence itself. *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005). Therefore, this memorandum notes that the good-faith defense within the instruction must be founded in the evidence of Smith's relationship with her husband and her lack of knowledge surrounding the financial and immigration affairs of her family.

Second, a good-faith instruction should not be restricted by language applying an objective reasonable test to the defendant's good-faith belief. The question is not whether the defendant's beliefs are objectively reasonable; the question is whether the defendant held those beliefs and that those beliefs amounted to a good-faith misunderstanding or lack of knowledge of the criminal conduct in question, thus eliminating the knowledge or willfulness element of the

[1] The burden of establishing lack of good faith and criminal intent rests on the government. A defendant is under no burden to prove his good faith; rather, the government must prove bad faith or knowledge of falsity beyond a reasonable doubt. 1 MODERN FEDERAL JURY INSTRUCTIONS - CRIMINAL PROCEDURE 8.01 (2020).

crime. *United States v. Pabisz*, 936 F.2d 80, 83 (2d Cir. 1991).

Third, the defendant is entitled to have the court clearly instruct the jury that if the good faith defense is believed, it justifies acquittal on those charges. The Second Circuit provides as much in *Regan*: "a generalized charge on good faith was insufficient to instruct the jury concerning appellants' specific good faith defense… appellants were entitled to have the trial court clearly instruct the jury, relative to appellants' theory of defense to the tax charges, that the theory if believed justified acquittal on those charges." 937 F.2d at 826-827 (1991).

Fourth, if the jury instruction is worded in a way to mislead the jury about the correct legal standard to be applied in the case, or it does not correctly inform the jury of the law, then it is erroneous and can be set aside by the court. *See Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1997); *Manley v. AmBase Corp.*, 121 F. Supp. 2d 758, 766 (S.D.N.Y. 2000). This principle can play an important role in considerations of the necessity of language explaining "good-faith" within the jury instruction.

Fifth, instructions about "no ultimate harm" could confuse the jury into believing that no harm needs to be intended as an element of the crime, which would not allow them to fully consider the acquittal potential of a good-faith defense. Such instructions were rejected by the Second Circuit in *United States v. Rossomando*, 144 F.3d 197, 201 (2d Cir. 1998). The rejected instructions stated "no amount of honest belief on the part of the defendant that the scheme would not ultimately result in a financial loss to the New York City Fire Department or its Pension Fund will excuse fraudulent actions or false representations by him to obtain money." *Id*. Though this is not the same as saying there is no good-faith defense, this language has the potential to confuse the jury into believing there actually is no good-faith defense. The Second Circuit acknowledges this in concluding "there is a substantial risk that the jury could have been confused into believing that the government was not required to prove that Rossomando intended to harm the Pension Fund…" *Id*. at 202. The Second Circuit did limit this ruling later on, allowing a "no ultimate harm" jury instruction to remain in *Chong Shing Wu v. United States*, because "the instruction is predicated on a distinction between immediate and ultimate harm that was simply nonexistent under the unique facts of *Rossomando*." *Chong Shing Wu v. United States*, 2014 U.S. Dist. LEXIS 69133, 36.

B. Discretionary Principle on Explanations of Good-Faith in Good-Faith Instructions in the Second Circuit

The Second Circuit's position on explanations of good-faith defenses in a good-faith instruction is that those explanations are not required by the court. This position is one within a circuit split on the issue. In 1985, the Supreme Court denied certiorari to a case that would have resolved the issue, but Justice White penned a dissent which laid out the circuit split and advocated for resolving it.

> The United States Court of Appeals for the Ninth Circuit held that if a specific intent instruction adequately covers the issue of good faith, that is sufficient to

> present the defense to the jury, and the defendant is not entitled to a separate good-faith instruction. 745 F. 2d 1205 (1984). Three other Courts of Appeals have reached the same conclusion. United States v. Gambler, 213 U.S. App. D.C. 278, 281, 662 F. 2d 834, 837 (1981); United States v. Bronston, 658 F. 2d 920, 930 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Sherer, 653 F. 2d 334, 337-338 (CA8), cert. denied, 454 U.S. 1034 (1981). Both the Fifth Circuit in United States v. Fowler, 735 F. 2d 823, 828 (1984), and the Tenth Circuit in United States v. Hopkins, 744 F. 2d 716, 718 (1984) (en banc), however, have reached the opposite conclusion. Both of these courts have held that when the defendant presents evidentiary support for his good-faith defense, the trial court must give a separate instruction to the jury on this issue… Given this square conflict among the Courts of Appeals, I would grant certiorari in this case. *Green v. United States*, 1985 U.S. LEXIS 4156, *1-2, 474 U.S. 925, 106 S. Ct. 259, 88 L. Ed. 2d 266, 54 U.S.L.W. 3268.

White noted that the Second Circuit has taken the position that a specific-intent instruction is sufficient to cover a good-faith defense. The Second Circuit has reaffirmed this position in multiple cases, leaving no room for doubt that the decision to specifically explain what a good-faith defense is at the discretion of the court. If willfulness is an element of the crime, as it is in the 18 U.S.C. § 1001 charge against Smith, then "a jury instruction on willfulness in criminal tax cases need not describe the contours of the good faith defense in exhaustive detail. Indeed, such an instruction need not reference the good faith defense at all… By explaining that a good-faith misunderstanding negates willfulness, an essential element of the offense, the jury instructions here left no room for doubt that a finding of a good-faith misunderstanding on the part of D'Agostino would preclude conviction. The district court's jury instructions were thus wholly proper." *United States v. D'Agostino*, 638 Fed. Appx. 51, 54, 2016 U.S. App. LEXIS 463, *5-6, 2016-1 U.S. Tax Cas. (CCH) P50,144, 117 A.F.T.R.2d (RIA) 2016-429.

In the Second Circuit, the most fact-specific similar case to the one at hand appears in *United States v. Al Morshed*, where the court again affirmed that non-necessity of including a separate explanation of the good faith defense: "this court has long adhered to the view held by a majority of the circuits that a district court is not required to give a separate "good faith defense instruction provided it properly instructs the jury on the government's burden to prove the elements of knowledge and intent, because, in so doing, it necessarily captures the essence of a good faith defense… To the extent a minority of the circuits take a different view, see *United States v. Casperson*, 773 F.2d 216, 223-24 (8th Cir. 1985) (requiring good faith defense charge when specifically requested and factually warranted); *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc)." *United States v. Al Morshed*, 69 Fed. Appx. 13, 16, 2003 U.S. App. LEXIS 12930, *6-7. The case also involved a misrepresentation of immigration documents, specifically a fraudulent INS I-94 form and an R-1 visa. These decisions make it near impossible to propose that the district court in our case is entirely required to include language precisely explaining the good-faith defense.

III. Creation and Analysis of the Proposed Good-Faith Jury Instruction

A. The Language of the Proposed Instruction Is As Follows:

Our ideal proposed jury instruction would include this language: "If Ms. Smith believed in good faith that the immigration forms were being handled in compliance with the law by other parties, even if she was mistaken in that belief, and even if others were injured by the conduct, there would be no crime. The good-faith defense established in this case completely defeats the charges levied against the defendant. The burden of establishing lack of good faith and criminal intent entirely rests on the government. Ms. Smith is under no burden to prove her good faith; rather, the government must prove bad faith or knowledge of falsity beyond a reasonable doubt. Good faith means that the defendant had 'good intentions and the honest exercise of judgment,' and thus did not knowingly or willfully lie to a federal government official under § 1001, or knowingly commit immigration fraud under § 1546(a)."

B. The Proposed Instruction Comports with the Principles of the Second Circuit.

The language provided in the instruction comports with the required principles that the Second Circuit and the Supreme Court have applied to good-faith jury instructions. The evidence supporting the instruction also allows the instruction to comport with these required principles.

The instruction is based on evidence which indicates that Ms. Smith had no knowledge or willfulness in the commission of the charges. This comports with the principle that the defense in the good-faith instruction is admissible only if this defense is founded in the evidence itself. *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005). Ms. Smith moved into a household which was "already staffed by domestic workers… all of whom had been vetted… she plainly had no desire or ability to interfere in the process that had been established by her husband." *DP Letter*, pg 13. Furthermore, "with respect to immigration status, Ms. Smith had no role." *Id.* This is sufficient foundation for a good-faith defense, and therefore, it warrants inclusion within the instruction.

The instruction does not include any language suggesting that there is an objective test to evaluate Smith's good faith belief. The phrase "if Ms. Smith believed" indicates that the defendant's own belief is the only important part; the question is whether the defendant held those beliefs and that those beliefs amounted to a good-faith misunderstanding or lack of knowledge of the criminal conduct in question, thus eliminating the knowledge or willfulness element of the crime. *United States v. Pabisz*, 936 F.2d 80, 83 (2d Cir. 1991). Because no such language exists discussing whether it is reasonable for the defendant to have had this belief, the jury instruction fulfills this principle.

The instruction must and does include language to express the defendant's entitlement to instruct the jury that if the good-faith is to be believed, then the charge is defeated. This occurs in our case, because the essential *mens rea* of the crime includes knowledge (18 U.S.C. § 1546(a) and § 1001) and willfulness (§ 1001), and if this element is defeated, the charge is defeated. Therefore, this entitlement must be expressed in the jury instruction, and indeed, it is in the

beginning: "If Ms. Smith believed in good faith that the immigration forms were being handled in compliance with the law by other parties, even if she was mistaken in that belief, and even if others were injured by the conduct, there would be no crime. The good-faith defense established in this case completely defeats the charges levied against the defendant."

C. The Court Should Elect To Include Language Explaining the Good-Faith Defense In Our Instruction.

Although the Second Circuit does not require that the district court elect to include language explaining what a good faith defense is or even the words "good faith," this court should be persuaded to utilize the good-faith defense to ensure that the jury fully understands the defense being used and understands the law. It is true that the Second Circuit maintains that "such an instruction need not reference the good faith defense at all… By explaining that a good-faith misunderstanding negates willfulness, an essential element of the offense, the jury instructions here left no room for doubt that a finding of a good-faith misunderstanding on the part of D'Agostino would preclude conviction." *United States v. D'Agostino*, 638 Fed. Appx. 51, 54, 2016 U.S. App. LEXIS 463, *5-6, 2016-1 U.S. Tax Cas. (CCH) P50,144, 117 A.F.T.R.2d (RIA) 2016-429. However, the risk for error in this case is too great owing to the circumstances, and the court should note times where it chose to exercise discretion to explain the good-faith defense. Therefore, the language explaining the good-faith defense in our instruction should be included: "The good-faith defense established in this case completely defeats the charges levied against the defendant. The burden of establishing lack of good faith and criminal intent rests on the government. A defendant is under no burden to prove his good faith; rather, the government must prove bad faith or knowledge of falsity beyond a reasonable doubt. Good faith means that the defendant had 'good intentions and the honest exercise of judgment,' and thus did not knowingly or willfully lie to a federal government official under § 1001, or knowingly commit immigration fraud under § 1546(a)."

Firstly, past instances of exercised discretion to explain the good-faith defense could motivate the court to exercise that discretion here. In this district court itself (SDNY), upon request by the jury, the court provided "clarification of the terms 'preponderance of the evidence' and 'good faith.' When the jury was asked its verdict as to Velez, it announced that it had found Mayer liable for $75,000 in compensatory damages. The jury was then recharged on the requested legal definitions." *Greene v. New York*, 675 F. Supp. 110, 119, 1987 U.S. Dist. LEXIS 11510, *25 This past example indicates that the jury has encountered confusion in understanding good-faith and a good-faith defense, and that danger is present in this case. Furthermore, other district courts have taken the initiative to provide specific explanations of the good faith defense. In *United States v. Maye*, the court "specifically instructed the jury concerning Maye's good-faith defense. As set out above, the good-faith instruction defined the parameters of the good-faith defense and specifically instructed the jury that good faith included "good intentions and the honest exercise of best professional judgment" and actions taken "in accordance with what [Maye] reasonably believed to be the standard of medical practice generally recognized." *United States v. Maye*, 2014 U.S. Dist. LEXIS 48480, *10, 2014 WL 1377225. Additionally, in *United States v. Funaro* 2004 U.S. Dist.

LEXIS 10413, *18-19, 222 F.R.D. 41, 47, the court "also explained the "good faith" defense [Jury Instruction 19]." These past instances demonstrate that when needed, Second Circuit district courts can and have gone out of their way to explain good-faith defenses, as is needed in the present case with Smith's defense.

The need for a good-faith instruction is embedded in the requirement by the Second Circuit for the jury charge to adequately inform the jury as to the proper legal standard or to the law. Otherwise, "a jury's verdict will be set aside based on an erroneous jury charge if the moving party can show that the error was prejudicial in light of the charge as a whole. See *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1997)." *Manley v. AmBase Corp.*, 121 F. Supp. 2d 758, 766, 2000 U.S. Dist. LEXIS 17312, *18-19. Some factors indicate a greater danger for the risk of a misled jury without the specific explanation of good-faith. First, this case is one where the good-faith defense applies to two charges, one requiring the elements of knowledge and willfulness (§ 1001) and the other with knowledge (§ 1546(a)). The jury may be confused by the differing requirements between the two charges. Additionally, there is also a danger that the jury, unfamiliar with subjective and objective tests, may think it needs to objectively evaluate whether they feel that the defendant's good-faith belief was reasonable to them, which is incorrect. *See Pabisz*, 936 F.2d at 83. An explanation, as the one in *Greene*, will prevent that danger.

Unfortunately, there are great limitations to the argument for adding specific language regarding good-faith defense. First, the cases in which district courts in the Second Circuit have taken the initiative to include specific good-faith language are not very similar on the facts to the case before us. These cases involve medical malpractice lawsuits in which the medical practitioner being sued was using his best good-faith professional judgement to make decisions. *United States v. Maye*, 2014 U.S. Dist. LEXIS 48480, *10, 2014 WL 1377225; *United States v. Funaro*, 2004 U.S. Dist. LEXIS 10413, *18-19, 222 F.R.D. 41, 47. On the other hand, the most similar case on the facts involved another opportunity by the Second Circuit to again affirm that non-necessity of including a separate explanation of the good faith defense: "this court has long adhered to the view… that a district court is not required to give a separate "good faith defense instruction provided it properly instructs the jury on the government's burden to prove the elements of knowledge and intent, because, in so doing, it necessarily captures the essence of a good faith defense."
United States v. Al Morshed, 69 Fed. Appx. 13, 16, 2003 U.S. App. LEXIS 12930, *6-7.

The Second Circuit has taken many opportunities to emphasize the non-necessity of including specific language about good-faith defenses, while rarely indicating instances where it would be a good idea to include that language. Therefore, it likely believes that language regarding intent and willfulness is entirely sufficient in all scenarios without ever violating the rule of misleading the jury in *Manley*. This presents a difficult challenge. That challenge will need to be overcome by indicating unique circumstances in the present case, such as Smith's abusive relationship resulting in her complete lack of knowledge, the two separate *mens rea* requirements from the two charges, and the importance of the good-faith defense to the case. It will then need to be overcome by demonstrating how those circumstances warrant an instruction that includes language specifying what good-faith is.

SG:

Sami Ghanem: Analysis Section from "Case Comment: The Fourth Circuit Should Reverse Course on Prior Pay."

i. The language in *Spencer* regarding prior pay is dicta

In the context of the overall opinion, the Fourth Circuit's language on prior pay in *Spencer v. Virginia State University* is clearly dicta. The court stated that "even if Spencer could meet her initial burden, her claim would still fail because the University established that the salary difference was based on a 'factor other than sex.'"[1] The court took the time to first evaluate whether the plaintiff made a prima facie showing of a violation of the Equal Pay Act through the establishment of three elements.[2] After having found that Spencer's claim does not meet the second element of a prima facie claim, the court did not proceed to analysis of the third element,[3] evidently deeming it sufficient that the claim was defeated. Only after having already established that Spencer's claim had failed did the court say, almost as an afterthought, that "*but even* if Spencer could meet her initial burden, her claim would still fail" [emphasis added] because prior pay is a non-sex based factor.[4] Because the language on prior pay is not necessary to the decision of the case, but simply serves as a comment, it fully meets the definition for *obiter dictum*.[5] The section written on prior pay does not affect the overall holding, which is that Spencer's claim fails on the second element of a prima facie claim of a violation under the Equal Pay Act.[6]

Furthermore, the court provided no justification or reasoning to explain why prior pay is a non-sex-based factor, nor why it would fit under the fourth exception of the Equal Pay Act. For such a consequential issue that has created such a divisive circuit split, it is perplexing that the Fourth Circuit

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[1] *Spencer*, 919 F.3d at 206. This opinion was heard by only a panel from the full Fourth Circuit, rather than the entire court, which lends credence to the idea that the panel was not willing to yet make a definitive ruling on this important issue until the entire court had the opportunity to weigh in.
[2] *Spencer,* 919 F.3d at 203.
[3] *Id.*
[4] *Spencer*, 919 F.3d at 206.
[5] Obiter dictum is defined in Black's Law Dictionary as "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." Black's Law Dictionary 1177 (9th ed. 2009).
[6] *Spencer,* 919 F.3d at 203.

cited little authority and provided little reasoning to support its language on prior pay, making it all the more likely that this language is dicta. The Fourth Circuit panel noted that the employer has the burden of asserting an affirmative defense that another non-sex-based factor was the reason for the disparity. This affirmative defense was the university's 9/12ths policy. But the court only addressed the plaintiff's argument that the 9/12ths policy was pretextual because it was applied inconsistently or erroneously, not because it was the use of prior pay.[7]

The court clearly ignored reasoning by the plaintiff and defendant about the status of prior pay. It did not respond to the plaintiff's argument in her opening brief, where she claimed, "*any* policy of transitioning administrators to the faculty at 9/12 of their administrator salary would have a disparate impact on women because VSU's highest-paid administrators were overwhelmingly men" [emphasis added].[8] It ignored the defendants' argument that the Ninth Circuit recently held "'prior salary alone or in combination with other factors cannot justify a wage differential.'… the reasoning of *Rizo* would have no application here."[9]

The court in *Spencer* could have decided to make a decision without adopting the entire holding in *Rizo* on the issue of prior pay, electing to rule narrowly on the facts and circumstances of the case presented before them. The defendants clearly seem to have treated this case in this narrow manner, adding that "should the Court wish to consider *Rizo*… Defendants would respectfully request leave to submit supplemental briefing."[10] In fact, the defendants are probably delighted with the final outcome of this case, because they did not even have to file a supplemental brief on *Rizo* or the subject of prior pay generally before the court contributed its dicta on prior pay. The court did not cite or repeat reasoning

[7] "Even if the University erroneously applied its 9/12ths practice to overpay Shackleford and Dial, such an imprudent decision would still serve as a non-sex-based explanation for the pay disparity." *Id.*
[8] Brief for Petitioner-Appellant at 49, Spencer v. Virginia State University, 2018 WL 1778726 (C.A.4).
[9] *Id*. at 49 fn. 9.
[10] Brief for the Respondent-Appellee, Spencer v. Virginia State University, 2018 WL 2096106 (C.A.4), 49 at fn 9.

from the defendants' brief or the plaintiff's brief, nor did it follow some reasoning present in the circuit split on the issue. The decision to write the opinion in this manner has left clear and obvious gaps that cannot be explained away or taken as solid precedent.

A review of past decisions also does not indicate that the Fourth Circuit has taken a position on the issue of prior pay as a non-sex-based factor. In *Brinkley v. Harbour Recreation Club*, the Fourth Circuit found that an employer may review experience and salary history and use those factors to make compensation decisions.[11] The court's precise language is that the employer "reviewed a resume and salary history, assessed its financial situation, compared its situation with that of other similarly situated entities, and negotiated with [the comparator] to reach a mutually satisfying agreement as to an appropriate salary. The evidence indicates that [the employer] reached this agreement on the basis of [the comparator's] individual merits, not on the basis of his sex."[12] The court in *Brinkley* found that a combination of these factors sufficient to establish that the employer made a decision that was not based on sex in a way that would be impermissible under the Equal Pay Act. This decision is distinct from the language in *Spencer*, because the Fourth Circuit in *Brinkley* talked about a combination of factors as non-sex-based, but does not talk about prior pay individually.

In conclusion, the nature of the language in *Spencer*, the complete lack of reasoning regarding the status of prior pay in the Equal Pay Act, and the absence of prior decisions ruling on prior pay indicate that the Fourth Circuit's language on prior pay in *Spencer* is dicta and that the Fourth Circuit has not made a binding ruling on prior pay yet. District courts within the Fourth Circuit should feel empowered to make rulings that contravene this language. It is also not too late for the Fourth Circuit to reverse course with ease and without precedential barriers.

[11] 180 F.3d 598 (4th Cir. 1999).
[12] *Id.* at 615.

ii. The reasoning of *Rizo* is applicable to the facts of *Spencer*.

The defendants in *Spencer* claimed that the reasoning of *Rizo v. Yovino* has no application to the case at hand,[13] but this is incorrect. The response brief stated that *Spencer* involves prior pay from the same employer whereas *Rizo* involves prior pay from a different employer, so when "the same employer sets an employee's pay for a new position, it may reasonably consider the employee's length of service, experience, and so on, which would be reflected in the employee's prior pay with that employer."[14] Certainly, the same employer could 'reasonably consider' these factors when deciding compensation, but if the old employer is the same as the new employer, those factors are even easier to identify in court. The Ninth Circuit specified that "rather than use a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is justified under the catchall exception."[15] Indeed, it is even easier for the same employer of past and present, like Virginia State University in *Spencer*, to justify the current pay based on those other underlying factors, because that employer has had the opportunity to identify those non-sex-based factors during the course of that employee's employment. It would be counterintuitive to the substance of *Rizo* if the court allowed the employer to apply prior pay as a factor in instances where it would be even easier to not use a proxy.

The fact that the past employer and the new employer are the same does not make prior pay permissible under the Equal Pay Act, nor does it mean that the reasoning of *Rizo* is inapplicable to the case of *Spencer*. Adopting the defendants' argument in *Spencer* would be counterintuitive, because it would be allowing an employer an exception from the normal affirmative defense burden just because the old employer is the same as the new one. This is despite the fact that the same employer should have an

[13] Brief for the Respondent-Appellee, *supra* note 76.

[14] *Id.*

[15] *Rizo v. Yovino*, 887 F.3d 453, 467 (9th Cir. 2018).

easier time identifying specific job-related non-sex-based factors that would justify the pay disparity. Additionally, the Ninth Circuit confirmed its total ban on prior pay in 2020,[16] which further defeats the argument by the defendants.

It is true that the Fourth Circuit is not bound by the decision of the Ninth Circuit, leaving the court free to plot its own path on the issue of prior pay. However, while the precedent of *Rizo* is not binding, it is certainly persuasive precedent, because the decision effectively and clearly explained why prior pay does not belong in the fourth exception of the Equal Pay Act by utilizing textual analysis of the EPA and the legislative intent in crafting it. Furthermore, empirical studies should convince the Fourth Circuit that prior pay is likely to be discriminatory on the basis of sex and should thus be avoided in compensation decisions.[17]

iii. Prior pay is a sex-based factor that does not belong to the fourth exception of the Equal Pay Act.

Empirical evidence, textual analysis of the Equal Pay Act, and the legislative intent of the Equal Pay Act all suggest that prior pay is a sex-based factor which perpetuates past discrimination and indicate that prior pay should not be placed in the fourth exception of the Equal Pay Act.

Evidence suggests that discrimination does play a significant role in salary history. Paul Weiler found that a number of legitimate factors could potentially reduce the pay disparity gap.[18] Included among these factors are the hours of work on the job, the length of experience in the labor force, and the location, hazards, and other conditions of work, which if taken into account, would reduce "the maximum level of

[16] "The majority embraces a rule not adopted by any other circuit—prior salary may *never* be used, even in combination with other factors, as a defense under the Equal Pay Act" [emphasis added]. *Rizo*, 950 F.3d at 1232.

[17] See Part II.C.iii.

[18] Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728 (1986).

wage gap to be explained by sex discrimination… [to] the order of ten to fifteen percent."[19] Nevertheless, it is admitted that such a gap would still result in "a substantial injustice" of billions of dollars of loss a year, and "if that annual shortfall is due to current or past sex discrimination, it is an injustice worth tackling..."[20]

Other evidence indicates that the current gender pay gap is caused by historical sex-based factors that usher women and men into different levels of pay. "The single biggest cause of the gender pay gap is occupation and industry sorting of men and women into jobs that pay differently throughout the economy…. Past research suggests this is due partly to social pressures that divert men and women into different college majors and career tracks, or to other gender norms such as women bearing disproportionate responsibility for child and elderly care, which pressures women into more flexible jobs with lower pay."[21] Non-sex-based factors actually account for very little of the difference in the pay gap.[22] Contrary to what the Seventh Circuit suggested,[23] the idea that societal discrimination encourages the shuttling of women into inferior jobs is supported in academic research as well: "Discrimination against women by both men and women, especially in the circumstances identified, helps uphold and maintain gender-linked social roles in society… . Society supports women receiving inferior pay and their being employed in work roles where they have little power and authority, as found by reviewers of empirical

[19] *Id.* at 1784.

[20] *Id.* at 1784-1785.

[21] "In the countries we examined, these factors explain between 14 percent and 26 percent of the gender pay gap, a finding that's consistent with academic literature." Dr. Andrew Chamberlain, Demystifying the Gender Pay Gap 3 (Glassdoor, 2016), https://www.classlawgroup.com/wp-content/uploads/2016/11/glassdoor-gender-pay-gap-study.pdf; Francine Blau & Lawrence Kahn, The Gender Wage Gap: Extend, Trends, and Explanations - NBER Working Paper No. 21913 (2016).

[22] "Differences in level of education, age and experience between men and women—what economists call "human capital"—explain little of the gender pay gap." Chamberlain, *supra* note 88 at 4.

[23] *Wernsing*, 427 F.3d at 467.

studies conducted in many developed countries including the U.S…. Women's lower salaries help ensure that the traditional gender-influenced hierarchical power structure is maintained."[24]

In conclusion, "it would seem reasonable to conclude that some significant portion of the gender wage gap is caused by the practice of underpaying work done primarily by women."[25] Prior pay perpetuates this portion of the gap and therefore should not permitted in compensation decisions. A practice which perpetuates past discrimination would run contrary to the purpose of the EPA.[26]

Next, assuming prior pay is by itself a non-sex-based factor does the work of the defendant. Prior pay is not even a factor, let alone a non-sex-based factor. It is a proxy for other factors, among which is likely to include historical sex-based discriminatory factors. The employer, in responding to a prima facie case alleging sex-based pay discrimination, has the burden of proving that "sex provide[d] no part of the basis for the wage differential."[27] That burden cannot be fulfilled by prior pay. Courts should not just assume that it is enough that "salary retention policies *may* serve legitimate, gender-neutral business purposes, such as the retention of skilled workers who may be needed in the future to perform higher level work"[28] [emphasis added]. The reality is that "the history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex."[29] Assuming that prior pay is a non-sex-based factor just because it might possibly act as a proxy for non-sex-based factors is not enough

[24] Phyllis Tharenou, *The Work of Feminists is Not Yet Done: The Gender Pay Gap—A Stubborn Anachronism*, Sex Roles: J. Research 198, 203 (2012).
[25] Weiler, *supra* note 85 at 1790.
[26] *Corning*, 417 U.S. at 195 (quoting S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963)).

[27] *Rizo*, 950 F.3d at 1228.

[28] *Taylor*, 321 F.3d at 717–18.

[29] *Rizo*, 950 F.3d at 1228.